Petition

81-685

No. 81-——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN M. GRIEG,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED FOR REVIEW

Pursuant to 10 U.S.C. § 1552, each civilian Secretary of a military department, acting through correction boards, is charged with correcting military records which are in "error" or which constitute an "injustice." Often, as in this case, an adverse correction board decision pertaining to a military record has the effect of sustaining an individual's mandatory, involuntary termination from the armed services. By regulation, the correction boards provide no right to an oral hearing, compulsory process, or cross examination. On review in the Court of Claims, a *de novo* trial is afforded.

The questions presented for review are as follows:

Whether it is a violation of the Administrative Procedure Act, 10 U.S.C. § 1552, the Due Process Clause of the Fifth Amendment, or the federal common law pertaining to judicial review for the Court of Claims to uphold such civilian correction board decisions

(a) by considering only the evidence adduced at the *de novo* trial which supports the correction board's factual determinations and by refusing to give any consideration or weight to either a plaintiff's *de novo* showing or the trial judge's findings to the contrary;

(b) by barring the fresh determination of facts by its trial judges when they review, at the trial *de novo*, the correction board factual determinations and by requiring those judges to find, absent a confession of error by the government, that the military record in dispute, in and of itself, constitutes sufficient evidence to support the board determination as to that record's accuracy; and

(c) by abridging the right to a trial *de novo* by failing to give any consideration or weight either to the evidentiary showings made by a plaintiff at such a proceeding or to the trial judge's findings.

PARTIES BELOW

The only parties to this proceeding in the court below are those indicated by the caption of this petition.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINIONS BELOW

The decisions of the Army Special Review Board (A. 63a-64a)[1] and the Army Board for Correction of Miiitary Records (A. 59a-62a) denying petitioner relief are not reported. The opinion and findings of the Court of Claims trial judge granting petitioner relief (A. 20a-58a) are not reported. The opinion of the Court of Claims reversing the decision of the trial judge (A. 1a-19a) is reported at 640 F.2d 1261.

JURISDICTION

The judgment and opinion of the Court of Claims (A. 1a-19a) were entered on January 28, 1981. A timely petition for rehearing was denied on May 15, 1981. A. 65a. On August 3, 1981, the Chief Justice entered an order (A. 66a) extending the time within which to file

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[1] Citations to "A." refer to the separate appendix that accompanies the instant petition pursuant to Rule 21.1(k) of this Court.

this petition to October 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

STATUTES AND REGULATIONS

There are set out in the appendix to this petition the following provisions:

Sections 131 and 207 of the Legislative Reorganization Act of 1946, *as amended*, 2 U.S.C. § 190g (1976) (partially repealed 1979) and 10 U.S.C.A. § 1552(a) (West Supp. 1980) (A. 67a-68a)[2]

Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706 (1976) (A. 67a)

Section 1 of the Tucker Act, *as amended*, 28 U.S.C. § 1491 (1976 & Supp. III 1979) (A. 68a-69a)

Department of the Army Regulations[3]

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AR 623-105 (1972) (A. 73)

AR 15-185 (1977) (32 C.F.R. § 581.3 (1977)) (A. 70a-72a)

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[2] On November 14, 1979, 2 U.S.C. § 190g was repealed insofar as it applied to the United States Senate. S. Res. 274, 96th Cong., 1st Sess., 125 Cong. Rec. S16588, S16602 (daily ed. Nov. 14, 1979). However, the substance of the statute's terms was preserved by inclusion within the Senate Standing Rules for Conducting Business. See Rule XIV, ¶ 9 (adopted pursuant to S. Res. 274, *supra*, 125 Cong. Rec. at S16690, *as amended by* S. Res. 389, 96th Cong., 2d Sess., 126 Cong. Rec. S2942 (daily ed. March 25, 1980). A. 74a. The substance of the statute's terms is also included in Rule XXII, ¶ 2, of the Rules of the House of Representatives, 97th Cong., 1st Sess. (1981).

[3] The regulations reproduced in the appendix are those which were in effect during the time periods relevant to this case. These regulations have not been changed substantively since those time periods. See AR 623-105 (1979); 32 C.F.R. § 581.3 (1980).

STATEMENT OF THE CASE

1. *Introduction.* The court below, acknowledging "the appealing facts of [petitioner's] case," described this action as raising "important questions concerning [its] jurisdiction and permissible scope of review." A. 2a. This proceeding culminates petitioner's almost decade-long efforts to correct an error in his military records which he contends led to his involuntary termination from the United States Army after seventeen years of active duty in that service. Congress does not permit the correction of military records by private bill. 2 U.S.C. § 190g; United States Senate Rule XIV, ¶ 9 (1981); House of Representatives Rule XXII, ¶ 2 (1981).[4] Instead, it has enacted legislation which delegates to the Secretary of each military service, acting through civilian correction boards, both the power and the duty to "correct any military record . . . when . . . necessary to correct an error or remove an injustice." 10 U.S.C. § 1552.[5] Under governing regulations, however, no right to an oral hearing, compulsory process, or cross examination is provided in Army correction board proceedings, and none of these procedural protections was afforded in this case. See 32 C.F.R. § 581.3(c) (5) (i)-(ii), (d). Except in circumstances not here relevant, the only assured opportunity for oral presentation, compulsory process, and confrontation of adverse witnesses accorded to individuals seeking relief pursuant to § 1552 occurs in the trial *de novo* in the United States Court of Claims to which plaintiffs are entitled when challenging an adverse correction board determination. Petitioner contends here that, by virtue of the restrictive scope of review announced and applied by the Court of Claims in this case, that single opportunity for an oral presentation and cross examination has been rendered meaningless in

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[4] See n.2, *supra*.

[5] See, *e.g.*, *Sanders* v. *United States*, 594 F.2d 804, 812 (Ct. Cl. 1979) (*en banc*) (pursuant to § 1552, "the Secretaries have a duty as well as the power to afford servicemen proper relief.")

that the Court of Claims' trial judges are henceforth effectively precluded from overturning correction board decisions unless the military record is inaccurate on its face or the government otherwise confesses error. In this regard, Court of Claims' trial judges are essentially prohibited from looking beyond the military record which is in dispute and considering the evidence presented by plaintiffs at the *de novo* trial.[6]

Petitioner seeks in this Court no new procedural rights in the correction process; rather, he merely maintains that the scope of review articulated by the Court of Claims below is at odds with well-established concepts of administrative law as enunciated in the Administrative Procedure Act ("APA") and decisions of this Court, and that, by effectively nullifying his one opportunity to confront adverse witnesses, it abridges procedural due process rights afforded by the Fifth Amendment. Petitioner further contends that the decision below conflicts directly with the Court of Claims' own assertions that Congress intended 10 U.S.C. § 1552, the statutory remedy for the correction of military records, to be "remedial and to be liberally construed, rather than [read] narrowly or technically." *Oleson* v. *United States*, 172 Ct. Cl. 9, 18 (1965).

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[6] For an analysis of the Court of Claims' jurisdiction over correction board decisions, see *Sanders*, *supra*, 594 F.2d at 809-13. Suffice it to say here that that court has exclusive jurisdiction over money claims against the United States not sounding in tort in excess of $10,000, which are premised upon, *inter alia*, federal statutes. 28 U.S.C. § 1491; 28 U.S.C. § 1346. Since a great many cases pertaining to correction board decisions involve former military personnel terminated from service because of allegedly erroneous records and since most resulting claims for back pay and retirement benefits exceed $10,000, the Court of Claims has been the principal forum for judicial review of correction board decisions. *Cf. Ogden* v. *Zuckert*, 298 F.2d 312, 315 (D.C. Cir. 1961). In the Court of Claims, plaintiffs challenging correction board decisions are "entitled to a trial on the merits, as a matter of right, so that [they] may have a judicial determination of the disputed factual issues involved in [their] claim[s]." *Bray* v. *United States*, 515 F.2d 1383, 1390 (Ct. Cl. 1975).

The undesirable consequences resulting from the holding at issue are illustrated by the facts of this case.

2. *Petitioner's Army Record.* The petitioner, John M. Grieg, is a much decorated veteran of the United States Army. Over the course of a seventeen-year military career as an enlisted man and then an officer,[7] he was certified, *inter alia*, as a Special Forces (*i.e.*, Green Beret) Officer and a Ranger Parachutist (A. 34a-35a) and served three separate tours of combat duty in Vietnam. A. 2a-3a. During his second Vietnam tour, he was the commander of a Green Beret counterinsurgency team which engaged in guerilla warfare in the Vietnam jungle for a six-month period (A. 36a) and, for that effort, he was "awarded the Bronze Star Medal" for "distinguishing himself by outstanding meritorious service in connection with ground operations against a hostile force." A. 22a, 35a-36a. He earned two Oak Leaf Clusters for his Bronze Star on the basis of further meritorious service with the 82nd Airborne Division during his third Vietnam tour. A. 3a, 47a-48a.[8]

3. *Events Pertaining to Petitioner's Involuntary Termination.*

a. *Notice of the third Vietnam assignment.* On June 22, 1966, petitioner was assigned to the Army's Arctic Test Center at Fort Greely, Alaska. A. 37a. His mission there was to evaluate the performance of various items of equipment under arctic conditions. A. 38a. Having recently completed his second tour of duty in Vietnam, it

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[7] After serving in an enlisted status from November 1952 to February 1956, petitioner received his commission in June 1958 pursuant to a Reserve Officers' Training Corps program at the University of Iowa, where he was rated a "Distinguished Military Graduate." A. 33a.

[8] Petitioner's other awards include a Combat Infantryman Badge, an Army Commendation Medal with Oak Leaf Cluster, an Air Medal, and a Meritorious Service Medal. A. 35a.

was petitioner's understanding, from briefings by Army personnel, that he would not, at least in the near future, be sent back to that country. Tr. 158.[9] At the time of his Fort Greely assignment, petitioner's only child was two months old. Because he and his wife expected that, "in accordance with [standard] Army policy, [his] assignment to Ft. Greely would continue for at least 2 years," they decided in the early months of 1967 to have a second child. A. 39a. It was anticipated that the child would be born in December 1967, and thus that "the family would be together at the time of the birth and during [the child's] early infancy." A. 39a.

In August of 1967, however, during his wife's pregnancy, petitioner received notice to begin a third tour of duty in Vietnam that December. A. 3a. Confronted with the prospect of being left in Alaska with a 16-month-old child and a newborn, and aware "of other officers who had not been called upon to do so much duty in Vietnam," petitioner's wife became extremely upset and resentful of "what she believed was unjust treatment of her husband." A. 3a.

In response to these domestic difficulties, petitioner, citing "extreme compassionate circumstances and personal family problems," formally tendered his resignation as an officer in the Regular Army. A. 3a, 40a. That resignation request was denied by the Army on grounds of "overriding military needs." A. 3a, 43a. Petitioner was, however, eventually afforded a postponement of his third Vietnam combat assignment until March 25, 1968, and was further assured that the tender of his resignation would "not be used as a determinant in promotion consideration or future assignments." A. 3a; PX. 58.[10]

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[9] Citations to "Tr." refer to the transcript of the trial below before the Trial Division of the Court of Claims.

[10] Citations to "PX." refer to the exhibits submitted by petitioner to the Trial Division of the Court of Claims in connection with the trial below.

b. *Completion of arctic tests.* At the time petitioner learned that he had been reassigned to Vietnam, his principal tasks were the evaluation under arctic conditions of a survival kit for infantry personnel and a system to enhance night vision. A. 44a-45a. Petitioner accelerated his work on these projects and completed the final versions of his test reports two months ahead of schedule and in time to meet his February 20, 1968 departure date from Fort Greely. A. 45a-46a.

By communication dated February 5, 1968, the Army Electronics Command commended as "outstanding" petitioner's night vision testing and stated that his efforts "reflect[ed] most highly on [his] . . . capabilities . . . ." A. 46a-47a. This communication was accompanied by a cover letter from the Arctic Test Center Commanding Officer congratulating petitioner "for a job outstandingly well done" and noting that petitioner's "entire tenure as a test officer has been worthy of such recognition." A. 47a. Soon after their submission, both of petitioner's reports were approved by the Army Test and Evaluation Command. PX. 87, 88.

4. *The Disputed Rating.* Notwithstanding petitioner's accelerated completion of his test reports and the praise he received for his work, his Officer Efficiency Report ("OER")[11] covering the period November 17, 1967 to

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[11] An Officer Efficiency Report is a periodic appraisal of an officer's performance of duty. AR 623-105 at § I-2(b) (1966). Three persons, termed the "rater," the "indorser," and the "reviewer," perform the evaluation. The rater will ordinarily be an immediate supervisor in the rated officer's chain of command or staff. The indorser is normally the individual who rates the rater, while the reviewer is usually the officer who rates the indorser. *Id.* at § II-6. One of the "primary purposes" of an OER is to provide a data base for personnel actions such as promotions. *Id.* at § I-2. Since the occurrence of the events at issue in this case, OERs have been renamed "Officer Evaluation Reports;" however, their function as the primary basis for promotion decisions has remained unchanged. AR 623-105 at § 1-3 (1979).

February 20, 1968 contained an extremely low rating. His composite numerical rating totalled only 166.0 (out of a possible 240) points. A. 6a. In contrast, the composite scores on the first two OERs rendered with respect to petitioner's services at Fort Greely totalled 203.7 and 209.1, respectively, while his average composite score, throughout his army career, was 202.2. A. 5a-6a.

The November 1967 to February 1968 OER also contained adverse comments. Major Herbert Lee Gregg, petitioner's OER rater,[12] stated that petitioner had "failed to prepare the reports of tests in the proper format or within the required time frame" and that, when questioned about his progress on the reports, had "displayed a very negative attitude." A. 4a. Lt. Colonel Alfred E. Williams, petitioner's OER indorser, wrote that, while "MAJ Grieg was a superior officer until he received his orders to Vietnam," during his "last 30 days . . . his dependability was seriously affected," and he "displayed a very negative attitude toward the Army." A. 4a.

Contrary to Army Regulations, petitioner was not informed prior to preparation of this negative OER that Major Gregg, a fellow officer for whom he had not worked, would serve as his rater (Tr. 164-165, 222-224). AR 623-105 at § I-3(c) (1966). Nor, since the OER "was prepared after [petitioner] left Fort Greely," was he accorded any prior notice of its contents or an opportunity to refute them. A. 6a, 51a. Neither Major Gregg nor Lt. Colonel Williams had "ever discussed with [petitioner] . . . any supposed deficiencies in his performance." A. 51a. Indeed, it was not until 1972, after he had been passed over for promotion to the rank of permanent major, that petitioner learned of the adverse rating he had received in 1968. A. 6a.

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[12] See note 11, *supra*, for a definition of the terms "rater" and "indorser."

5. *Administrative Proceedings.*

a. *Before the Special Review Board.* In January 1973, petitioner was passed over a second time for promotion to permanent major, and was therefore involuntarily terminated on November 1, 1973 from active duty pursuant to 10 U.S.C. § 3303(d), a statute requiring the discharge or retirement of an officer twice rejected for promotion to the permanent grade of captain, major or lieutenant colonel. A. 2a.[13] Believing that his single adverse OER inaccurately and unfairly characterized his performance of duties and that it was the cause of his promotion passovers, petitioner, pursuant to 10 U.S.C. § 1552, on October 5, 1973, filed with the Army Board for Correction of Military Records an application to void that OER and his resulting promotion failures. A. 6a, 52a.

Before his application could be considered by the correction board, petitioner was required to seek relief from an Army Special Review Board—a body designated by Army regulations to rule upon challenges to OERs. AR 623-105 at §§ 8-2(a), 8-3(b) (1972). Before that body, petitioner supported his contention that the OER was inaccurate with eighteen exhibits demonstrating the high quality of his service to the Army prior to, during, and subsequent to the period covered by the OER, including the various commendations he had received with respect to the arctic testing reports and two statements dealing with his performance made by Captain Jack Cook, a test

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[13] This statute was recently repealed by § 204 of the Defense Officer Personnel Management Act, Pub. L. No. 96-513, 96th Cong., 2d Sess. (1980), *as amended by* the Defense Officer Personnel Management Act Technical Corrections Act, Pub. L. No. 97-22, 97th Cong., 1st Sess. (1981). The promotion provisions within the new statute, except under certain defined circumstances, continue to require the discharge or retirement of officers twice passed over for promotion to the ranks of captain to lieutenant colonel. 10 U.S.C.A. §§ 631, 632, 637 (West Supp. 1980). See note 24, *infra*.

officer who served with petitioner at Fort Greely and who disputed several of the adverse factual contentions within petitioner's OER and supported petitioner's statements concerning the high quality and timeliness of his work. PX. 72, 73 at 3.[14]

An unsigned "case summary" prepared for use by the special review board in connection with petitioner's case concluded that, although it appeared that the negative OER "was a major factor in [petitioner's] non-selection" for promotion, there was "insufficient evidence to support the claim that the contested report was not accurate[]. . . ." PX. 93 at 5, 6. This latter conclusion was premised almost exclusively upon information obtained from Lt. Colonel Williams, the indorser of the OER, during an *ex parte* telephone conversation with the review board's staff. A. 53a-54a; PX. 93 at 5; Tr. 275-276. According to the case summary, Lt. Colonel Williams stated that once petitioner had been assigned to his third Vietnam tour, he "practically quit work" and "spent most of [his] time and energy attempting to get out of the Nam assignment . . . [by] telephoning [the Department of the Army] and congressmen, and writing letters." A. 7a. Moreover, Lt. Colonel Williams stated that he was forced to redo some of petitioner's tests because petitioner's data was incomplete. A. 7a.

In a one-page letter dated February 27, 1974, petitioner was advised that the special review board denied his appeal because "the evidence does not justify" voiding the OER. A. 63a. Petitioner was not accorded a hearing prior to this denial, nor was he given notice of, much less an opportunity to refute, the *ex parte* comments. A. 2a.

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[14] The Cook averments and the documentary exhibits were presented pursuant to Army regulations which require that statements of third parties who observe an officer's performance and any related documentary evidence from official sources be presented as evidence of an inaccuracy in an OER. AR 623-105 at § 8-1(c) (1972).

b. *Before the Correction Board.* Petitioner then pursued his claim before the correction board. Oral hearings are provided by that body only as a matter of discretion, and, even when granted, the applicant has no power of subpoena or right to cross examination. 32 C.F.R. § 581.3 (c) (5) (i)-(ii), (d). On October 19, 1977, petitioner's application, brief, and supporting exhibits were considered by the board in executive session along with approximately 110 other correction cases, and denied without granting petitioner an oral hearing. A. 6a; PX. 114.[15] In its four-paragraph statement of the reasons for denying relief, the correction board relied extensively on Lt. Colonel Williams' *ex parte* telephone conversation. A. 62a.

6. *Trial Division Proceedings.* Petitioner then instituted the present suit in the Court of Claims seeking back pay, retirement benefits, and the voiding of the OER and promotion passovers. During a three-day trial which ensued before that court's Trial Division, petitioner testified that the negative comments contained in the disputed OER and in Lt. Colonel Williams' *ex parte* statement were factually incorrect, and that he properly and promptly completed his test reports.

Petitioner's testimony was supported by that of his wife and Captain Cook. A. 4a. Indeed, it was supported in many respects by Lt. Colonel Williams, who, contrary to his remarks in the OER and his *ex parte* comments, admitted that: (1) the data petitioner had gathered for his test reports were complete, and Lt. Colonel Williams did not have to reperform any of the tests (Tr. 276-279, 337); (2) the final reports were authored by petitioner (Tr. 306-308); and (3) he (Lt. Colonel Williams) had no personal knowledge of petitioner contact-

[15] Aside from ruling on 110 applications, the Board, on October 19, 1977, also held three formal hearings on other matters. PX. 114.

ing Army Headquarters or Congressmen to change his Vietnam reassignment (Tr. 331-332, 335-336).

In his opinion and his findings of fact (A. 20a-58a), Senior Trial Judge Mastin G. White determined that all of the negative remarks made in the OER and in Lt. Colonel Williams' *ex parte* statement either were completely false or, though literally true, conveyed a misleading adverse impression concerning petitioner's performance of his duties. A. 50a-51a, 54a-55a.[16] The trial judge further found that the OER "did not represent an accurate, objective, fair, or just evaluation of [petitioner's] performance"; that its factual inaccuracies "indicate[d] a prejudicial state of mind . . . toward [petitioner] . . . [which] was evidently due to the Vietnam assignment and the [petitioner's] attempt to avoid it by submitting his resignation"; and that the low rating it contained was the "major factor" in petitioner's failure to secure promotion. A. 28a, 49a, 52a.

In light of these facts, the trial judge ruled that petitioner had been deprived of his right to be evaluated for promotion on the basis of a record which fairly portrays his career, and that the correction board's decision not to void the OER was "unsupported by substantial evidence and . . . contrary to law." A. 29a-31a. He recommended that, as relief, petitioner receive back pay for the duty he would have performed had he not been discharged on November 1, 1973, back retired pay, and correction of his military records to void the contested OER and documents showing his failures to secure promotion. A. 31a-32a, 57a-58a.

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[16] For example, the trial judge found misleading various statements made by Lt. Colonel Williams concerning the extent to which petitioner's test reports had to be revised prior to publication in final form. Although petitioner's reports had to be to some extent "worked over" by petitioner and a group of fellow officers after their initial submission, such "working over" of draft reports was the customary procedure for all draft submissions at Fort Greeley and, in any event, petitioner's work never had to be modified in any substantial way. A. 51a, 55a.

7. *Court of Claims Decision.* On review, a panel of the Court of Claims (Judges Kashiwa, Bennett, and Smith) reversed. Although acknowledging that petitioner "was not granted a hearing until he came to the court," it concluded that the trial judge "in his zeal to do justice as he saw it . . . innocently went beyond the permissible scope of review . . . by substituting his judgment of [petitioner's] performance of duty for that of [petitioner's] rating and indorsing officers, reflected on the OER, which constituted substantial evidence before the board . . . ." A. 2a, 16a. In this regard, the Court of Claims held that "[i]t is the rater's view that counts in the end," and "there [was] no concession by the rater or indorser [at trial] that the rating was factually wrong." The court held that it was error to weigh against the OER "self serving testimony," such as records concerning petitioner's career, commendations he received for the assignment at issue in the OER, or the testimony of himself, his wife, and Captain Cook. A. 12a, 16a. Moreover, in its view, the correction board's decision could be deemed based on "substantial evidence," even though that board made its decision without the benefit of the evidence ultimately adduced on trial—including Lt. Colonel Williams' refutation of remarks contained in the OER and his *ex parte* statement—evidence which convinced the trial judge that the correction board's decision was unsupported by the requisite evidence. A. 13a-16a.

REASONS FOR GRANTING THE WRIT

A. THE COURT OF CLAIMS' DECISION BELOW IS IMPORTANT, WILL HAVE BROAD IMPACT, AND CONFLICTS WITH CIRCUIT COURT RULINGS.

In the following sections of this petition, we show in some detail that the scope of review applied by the Court of Claims in the correction board context is a substantial departure from well-accepted principles of administrative law as enunciated in the APA and the decisions of this Court. It also conflicts with Congress' remedial pur-

poses in establishing the correction board system and negates procedural due process rights otherwise afforded by the Fifth Amendment. In this regard, we show that, as a practical consequence of the decision below, a plaintiff can prevail in these cases only if the government confesses error as to the accuracy of a military record.

Our point here is that the issues raised by the decision below have broad impact. The critical statutory remedy standing between those Americans who have been or are under arms to this Nation and a prejudicial error in their military records is the relief afforded by the military services' civilian correction boards and, when back pay and retirement benefits in excess of $10,000 are involved, the corresponding review of board decisions in the Court of Claims. See n. 6, *supra*. While other courts have occasion to review correction board decisions, the Court of Claims is the principal forum for these cases, because of the substantial breadth of its jurisdiction. As the D.C. Circuit has acknowledged: "The most pertinent judicial decisions interpreting the nature of these Boards have arisen in litigation before the United States Court of Claims." *Ogden, supra*, 298 F.2d at 315. Accordingly, when the Court of Claims describes this case as raising "important questions concerning [its] jurisdiction and permissible scope of review," it acknowledges that the issues raised are of general importance, and thus worthy of this Court's attention.

Finally, as we show below, the restrictive scope of review enunciated by the Court of Claims in this case places it at odds with at least one Circuit's rulings on the way in which correction board decisions should be judicially reviewed. See pp. 18-19, *infra*.

B. THE COURT OF CLAIMS' USE OF A SUBSTANTIAL EVIDENCE TEST TO REVIEW FACTS FOUND *DE NOVO* AFTER TRIAL CONFLICTS DIRECTLY WITH DECISIONS OF THIS COURT.

1. *Right To Trial* De Novo. The Court of Claims has recognized that, by enacting the correction board statute (10 U.S.C. § 1552), Congress imposed upon correction

boards "a *duty* as well as the *power* to afford servicemen proper relief." *Sanders*, *supra*, 594 F.2d at 812 (emphasis added). Yet, that court has also recognized that, despite the critically important role played by these boards and subsidiary military fact finding tribunals in military pay cases, the correction process is fraught with procedural infirmities. See, *e.g.*, *Brown* v. *United States*, 396 F.2d 989, 994-99 (1968). The facts of this case clearly illustrate the point.[17]

Because of these infirmities, the Court of Claims has long held that "[i]n military pay cases such as this judicial review is not limited to the administrative record," and that a plaintiff, "in this court, is entitled to a trial on the merits, *as a matter of right*, so that he may have a judicial determination of the disputed factual issues involved in his claim." *Bray*, *supra*, 515 F.2d at 1390 (emphasis added). *Accord*, *McGahey* v. *United States*, 213 Ct. Cl. 717, 719 (1977); *Montilla* v. *United*

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[17] As we have shown in the statement above, petitioner, contrary to Army regulations, was not informed of the identity of his OER rater prior to the preparation of the OER here in dispute, and the rater was, in fact, an officer for whom petitioner had not worked. Neither the OER rater nor indorser had ever conveyed any criticism to petitioner while he was at Fort Greely. Indeed, petitioner did not learn of the adverse OER until four years after it had been rendered, and thus subsequent to its use by an Army selection board determining his fitness for promotion.

Petitioner was accorded no opportunity for a hearing in order to refute the OER before the selection boards which passed him over for promotion. Nor was he entitled to an oral hearing before the special review board which reviewed the accuracy of his OER. Indeed, the review board resolved his claim on the basis of an unsigned case summary, which, in turn, was premised almost exclusively upon an *ex parte* telephone call to the OER indorser. The correction board also denied petitioner's application in executive session without granting him an oral hearing and relied, for its decision, upon the review board's analysis. Indeed, on the same day it considered and disposed of petitioner's application, it conducted three "formal" hearings and resolved 110 applications for the correction of militiary records. The substantive analysis of petitioner's requests for relief by both the review board and the correction board consumed only a single page of discussion.

States, 457 F.2d 978, 982-83 (Ct. Cl. 1972); *Brown*, *supra*, 396 F.2d at 992-1001; *Beckham* v. *United States*, 375 F.2d 782, 785 (Ct. Cl. 1967). In this regard, the Court of Claims has concluded that the "non-adversary records of the kind we have before us in a large segment of the [correction board] cases cannot form the sole basis for a judicial decision. *They are too infirm and incomplete.*" *Brown*, *supra*, 396 F.2d at 997 (emphasis added). See also, *e.g.*, *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971) (sanctioning the taking of *de novo* evidence when "agency fact finding procedures are inadequate"). Thus, in the Court of Claims' view, introduction of *de novo* "evidence has proved invaluable in fully understanding and evaluating the basis—or lack of basis—for the administrative decision." *Brown*, *supra*, 396 F.2d at 997. Accordingly, a trial *de novo* was held below without any objection from the government.

2. De Novo *Scope of Review*. Decisions of this Court clearly establish that a trial court reviewing agency action *de novo* "should make an independent determination" of the facts based upon the evidence adduced before it. *United States* v. *First City National Bank*, 386 U.S. 361, 368 (1967). *Accord*, *Citizens to Preserve Overton Park, Inc.*, *supra*, 401 U.S. at 415 (*de novo* review entails "independent judicial factfinding"); *Woodby* v. *Immigration & Naturalization Service*, 385 U.S. 276, 278 n. 2 (1966) (*de novo* review entails an "independent determination of the factual issues. . . ."). See also, *e.g.*, *Chandler* v. *Roudebush*, 425 U.S. 840, 852-64 (1976).[18] Indeed, in *Renegotiation Board* v. *Bannercraft*

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[18] This Court has also held in this regard that while administrative findings "may, of course, be admitted as evidence" in the judicial proceedings, *Chandler*, *supra*, 425 U.S. at 863-64 & n.39; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 60 & n.21 (1974), such findings will be "accorded [only] such weight as the court deems appropriate" after a consideration of all evidence presented. *Id.* at 60; *Weahkee* v. *Perry*, 587 F.2d 1256, 1263 (D.C. Cir. 1978) (Robb, J.).

Clothing Co., 415 U.S. 1, 23 (1974), this Court explicitly recognized that a "*de novo* proceeding" in the Court of Claims is one "unfettered by any prejudice from the agency proceeding *and free from any claim that the [agency's] determination is supported by substantial evidence.* . . . [T]he parties are not bound by a prior determination made at [the agency] level. . . ." (Emphasis added.) The Court of Claims, by virtue of its own rules, has acknowledged these precepts by mandating that "[d]ue regard [be given] to the circumstances that the trial judge had the opportunity to evaluate the credibility of the witnesses," and by requiring that "the findings made by the trial judge shall be presumed to be correct." Ct. Cl. Rule 147(b).

3. *Substantial Evidence Test Applied to* De Novo *Findings.* Had the Court of Claims followed this Court's explicit precedents pertaining to *de novo* review, there can be little doubt that the trial judge's decision in this case would have been affirmed. But the Court of Claims has refused to permit its trial judges in military pay cases to make a "fresh determination of the facts and issues" even though *de novo* evidence has been taken. *Weahkee, supra*, 587 F.2d at 1263. Instead, that court, contrary to this Court's direction that Court of Claims' *de novo* review should be "free from any claim that the [agency's] determination is supported by substantial evidence," has insisted upon "applying its substantial evidence test to the findings of the Board." *Beckham, supra*, 375 F.2d at 785. *Accord, Brown, supra*, 396 F.2d at 992; *Bray, supra*, 515 F.2d at 1391. The Court of Claims therefore felt it sufficient to conclude in this case that the Officer Efficiency Report ("OER") in question "constituted [the] substantial evidence" (A. 18a) upon which the correction board decision could be sustained and held that the trial judge erred in considering any *de novo* evidence to the contrary.

It has been widely acknowledged that the Administrative Procedure Act ("APA") governs review of civilian

correction board decisions. See, *e.g.*, *Neal* v. *Secretary of Navy*, 639 F.2d 1029, 1036 (3d Cir. 1981); *Roelofs* v. *Secretary of Air Force*, 628 F.2d 594, 599 (D.C. Cir. 1980); *Buchanan* v. *United States*, 621 F.2d 373, 384 (Ct. Cl. 1980); *Sanders*, *supra*, 594 F.2d at 812. Section 706(2)(E) of that Act makes clear that the "substantial evidence" test is used only when a court is reviewing agency fact finding made pursuant to a trial-type hearing required by statute. *Camp v. Pitts*, *supra*, 411 U.S. at 140-41; *Citizens To Preserve Overton Park, Inc.*, *supra*, 401 U.S. at 414-15. No statute required that petitioner be granted an adjudicatory hearing before the correction board, and, to say the least, the consideration afforded to his application for correction cannot be characterized as a formal, trial-type proceeding. The Court of Claims' use of the substantial evidence test in situations such as the present case, where a *de novo* trial is necessitated because the record presented to that court is "too infirm and incomplete," *Brown*, *supra*, 396 F.2d at 997, constitutes a dramatic departure from the mandates of the APA and the requirements of this Court.

The use of the substantial evidence test in this type of situation is aggravated by the Court of Claims' ruling in this case which, as we show in detail in the following section, effectively sustains the correction board except in those rare instances where the government has confessed that a military record is inaccurate. As a result, the *de novo* trial afforded in § 1552 cases in the Court of Claims is rendered almost meaningless since, absent a concession of error, none of the plaintiff's evidence can be considered to determine whether the correction board should be overturned.

As a result of the Court of Claims' decision below, there now exists among federal appellate courts a wide divergence of opinion concerning the scope of review of correction board decisions. The Third and Ninth Circuits have ruled that *de novo* trials should not be granted by district courts reviewing correction board decisions. *Ragoni* v. *United States*, 424 F.2d 261, 263 (3d Cir. 1970); *San-*

ford v. *United States*, 399 F.2d 693, 694 (9th Cir. 1968). Yet, the Fifth Circuit affords *de novo* trials in this context. *Nolen* v. *Schlesinger*, 492 F.2d 787 (5th Cir. 1974). The Court of Claims grants *de novo* trials "as a matter of right," *Bray*, *supra*, 515 F.2d at 1390, but, by virtue of the restrictive scope of review enunciated in this case, renders these proceedings virtually meaningless. See pp. 19-23, *infra*.[19]

This substantial confusion within the federal appellate courts as to the manner in which to review correction board decisions makes the Court of Claims' decision at issue fully worthy of this Court's attention.

C. THE COURT OF CLAIMS' REFUSAL TO EXAMINE CORRECTION BOARD DECISIONS ON THE BASIS OF THE "WHOLE RECORD" CONFLICTS WITH THE APA AND DECISIONS OF THIS COURT.

Even if application of the substantial evidence test were appropriate here, the Court of Claims has seriously misapplied it. Section 706 of the APA provides that, when using the substantial evidence test to determine the adequacy of agency fact finding, a court must "review the *whole record* or those parts of it cited by a party. . . ." (Emphasis added.) This provision was included within the APA to defeat the pre-APA practice employed by

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[19] In *Nolen*, the Fifth Circuit, in granting *de novo* review, attempted to harmonize its ruling with the Ninth Circuit's *Sanford* decision (denying *de novo* proceedings) on the ground that the evidence the plaintiff sought to adduce in *Sanford* concerned issues not raised before the correction board. 492 F.2d at 787. In *Sanford*, however, the Ninth Circuit squarely held that the trial "court's function . . . [is] confined to a review of the evidence submitted to the [Army] Board for Corrections." 399 F.2d at 694.

On remand, the *Nolen* court, although applying a substantial evidence test to the *de novo* record for purposes of determining the validity of the Board's findings, made clear by its analysis that courts reviewing correction board determinations must examine the *entire* administrative and *de novo* record before reaching a decision, and thus, its analysis conflicts with that of the Court of Claims. *Nolen* v. *Rumsfeld*, 535 F.2d 888, 889-90 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977).

some courts, which was to " 'read only one side of the case and, if they [found] *any* evidence there, the administrative action [was] sustained and the record to the contrary ignored.' " Schwartz, *Administrative Law* § 210 at 593 (1976) (quoting *Report of the Attorney General's Committee* at 210-11 (1941)) (emphasis added). Under "this [pre-APA] interpretation, substantial evidence meant, in effect, such evidence as *standing alone* would be sufficient to support a finding," no matter "how heavily the countervailing evidence [might] preponderate . . . ." *Id.* (Emphasis added.)

In the landmark case of *Universal Camera Corp* v. *NLRB*, 340 U.S. 474, 487-88 (1951), this Court emphatically rejected the so-called "any" evidence test, stating:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting [an agency] decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the [APA] definitively precludes such a theory of review and bars its practice. *The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.* This is clearly the significance of the requirement . . . that courts consider the whole record." (Emphasis added.)

By virtue of the decision below, the Court of Claims, contrary to the holding of *Universal Camera Corp.*, has reverted to the practice of upholding agency fact finding whenever the record contains "any" evidence to support the agency decision. Thus, en route to its decision concerning the substantiality of the evidence before the correction board, the Court of Claims focused almost exclusively upon the very document in dispute and characterized as error the trial judge's consideration of evidence refuting it.

The Court of Claims discounted any examination in cases of this sort of such documentary evidence as "the

Army Electronics Command commendation of [petitioner's] work and the letter by [his] commander, Col. Nabors, which forwarded that commendation to plaintiff" on the ground that "[t]hose personnel were not legally responsible for . . . making an evaluation of that work for the military," (A. 13a)[20] and dismissed as "self serving" (A. 16a) the testimony of petitioner, his wife, and Captain Cook—all of which contradicted the indorser's *ex parte* comments that petitioner had "spent most of [his] time and energy attempting to get out of the Nam assignment," "practically quit work," and possessed a very negative attitude. See pp. 8, 10, *supra*. Finally, the Court of Claims characterized as "slight variations" (A. 15a) from the record before the correction board, Lt. Colonel Williams' concessions at trial that petitioner had, in fact, completed his assignments, that the final reports submitted to the Army Test and Evaluation Command were authored by petitioner, and that Lt. Colonel Williams had no personal knowledge of petitioner spending his "time and energy attempting to get out of the Nam assignment." See pp. 11-12, *supra*.

In dismissing, for purposes of correction board review cases, the worthiness of such evidence as Captain Cook's testimony discrediting petitioner's OER and petitioner's commendations from superiors generously praising his work, the Court of Claims conveniently chose to ignore the fact that presentations of this nature are exactly the kind of evidence *required* by Army regulations to demonstate an inaccuracy in an OER.[21]

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[20] This highly technical conclusion disregards the obvious fact that as commander of Arctic Test Center, Col. Nabors had "legal responsibility" for evaluating petitioner's work and, indeed, was quite familiar with it in that he directly oversaw the preparation of petitioner's OER for the period immediately preceding the rating period in question. PX. 27.

[21] AR 623-105 (1974) provided that an officer, in order to invalidate an OER, had to provide "statements from third parties who were in official positions which enabled them to observe directly the manner in which the [rated officer] performed his

In short, the Court of Claims, in express contradiction of this Court's mandate in *Universal Camera Corp.*, held that its trial judges should "determine the substantiality of the evidence" by relying upon only the "evidence which in and of itself justified" the correction board decision, and should refuse to "tak[e] into account contradictory evidence or evidence from which conflicting inferences could be drawn." 340 U.S. at 487-88. Indeed, the Court of Claims expressly criticized the trial court for doing exactly that which *Universal Camera* requires, "tak[ing] into account whatever in the record fairly detracts from" the evidence upon which the agency relied. *Id.*[22]

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duties during the rated period, and/or other pertinent documentary evidence from official sources." *Id.*, § 8-1(c). The current version of AR 623-105 calls for a substantially similar evidentiary showing. AR 623-105 at § 9-7(c) (1979).

[22] The harshness of the Court of Claims' application of the substantial evidence test below is illustrated most clearly by its total disregard of the trial judge's finding that "the evidence in the record does not disclose any factor, other than the unfair and unjust OER . . ., which might have caused the plaintiff's pass-overs [for promotion] by the . . . selection boards." A. 30a. This finding was supported, *inter alia*, by the conclusion within the unsigned case summary before the Army Special Review Board that it appeared that the "contested report was a *major* factor in his non-selection." PX. 93 at 4. (Emphasis added.)

The Court of Claims concluded on review that there was no "clear nexus" between the OER and plaintiff's passovers by the selection boards. A. 16a-17a. Yet, it was not able to point to any evidence in the record suggesting that there were other factors involved in petitioner's failure to be promoted. In any event, the Court of Claims has frequently held that the "most critical item in an officer's selection folder is his OER," *Skinner* v. *United States*, 594 F.2d 824, 831 n.4 (1979) and that once it is found that an OER is in error, the *burden is on the government* to show by "'substantial evidence . . . that it was unlikely that the officer would have been promoted in any event.'" *Riley* v. *United States*, 608 F.2d 441, 444 (1979) (quoting *Sanders*, *supra*, 594 F.2d at 818). Again, no evidence was introduced or relied upon at any level of review showing that anything other than the adverse OER formed the basis of petitioner's failure to be promoted.

In applying this unduly restrictive standard of review, the Court of Claims correctly recognized that "[t]he cold reality of the situation is that it will always be difficult to overcome the discretionary judgments and evaluations by the rater and indorser . . . ." A. 15a. It suggested that the only evidence which could refute an OER would be a "concession by the rater or indorser that the rating [is] factually wrong." A. 16a. Indeed, under the Court of Claims' scope of review, the "cold reality" is that, unless the government confesses error, review of correction board factual determinations as to the accuracy of a military record is "a hopeless formality for the litigant. . . . It reduces the judicial process in such cases to a mere feint." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 210 (1947) (Jackson, J., dissenting).

On the one hand, the Court of Claims has determined that service personnel have a *right* to a trial *de novo* on appeal from correction board determinations because: (1) "the administrative record consists, as here, simply of the official military records plus the written materials"; (2) even when oral hearings are granted by the correction board, they are not "adversary with the right to cross examine all opposing witnesses . . . as is now normal for the regulatory agencies and the boards of contract appeals"; and (3) *de novo* "evidence has proved invaluable in fully understanding and evaluating the basis—or lack of basis—for the [board] decision." *Brown*, *supra*, 396 F.2d at 995, 997, 998. By virtue of the decision at issue, however, the Court of Claims has removed completely the meaningfulness of a *de novo* proceeding because the correction board will always be sustained unless the evidence supporting that tribunal's determination "carries its own death wound." *NLRB* v. *Robbins Tire & Rubber Co.*, 161 F.2d 798, 800 (5th Cir. 1947).

The Court of Claims' departure from the accepted method of applying the substantial evidence test is a further issue deserving the attention of this Court.

D. THE RESTRICTIVE SCOPE OF REVIEW APPLIED BELOW CONFLICTS WITH THE REMEDIAL INTENT OF CONGRESS IN ESTABLISHING CIVILIAN CORRECTION BOARDS.

The Court of Claims has frequently held that the duty imposed upon correction boards to correct "errors" and "injustices" in military records constitutes "'*an abiding moral sanction* to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.'" *Sanders*, *supra*, 594 F.2d at 813 (quoting *Duhon* v. *United States*, 461 F.2d 1278, 1281 (Ct. Cl. 1972)) (emphasis added). It has, accordingly, been emphasized that the correction board statute is "remedial and to be liberally construed, rather than [read] narrowly or technically," *Oleson*, *supra*, 172 Ct. Cl. at 18.

The scope of review applied by the court below flies in the face of the remedial purposes of § 1552. The Court of Claims has concluded that a correction board finding that there is no "error" or "injustice" in an OER can be overturned only if military personnel demonstrate a "'*gross material error of fact*'" or a "*gross injustice*" in the board's decision, by showing, for example, "a concession by the rater or indorser that the [OER] was factually wrong." A. 15a, 16a (quoting *Sanders*, *supra*, 594 F.2d at 813 and *Skinner*, *supra*, 594 F.2d at 830) (emphases added). In effect, then, through its restrictive scope of review the Court of Claims has substantially narrowed the situations involving errors or injustices in which it will grant relief. The Court of Claims has thus ignored the standards established in § 1552 and defeated completely Congress' remedial intent in enacting that provision.

Given the importance of § 1552 to service personnel and the predominant role the Court of Claims plays in that statute's construction, the question whether that court can alter the terms of § 1552 by application of a scope of

review test is a matter which should also be addressed by this Court.

E. THE RESTRICTIVE SCOPE OF REVIEW APPLIED BY THE COURT BELOW NEGATED PETITIONER'S DUE PROCESS RIGHT TO AN ORAL HEARING AND TO CONFRONT ADVERSE WITNESSES.

A majority of this Court has concluded that federal civil service employees, because they can be discharged only "for cause," have a property interest in continued employment sufficient to trigger due process protections. *Arnett* v. *Kennedy*, 416 U.S. 134, 166 (1974) (Powell, J., concurring); *id.* at 185 (White, J., concurring and dissenting); *id.* at 209 (Marshall, J., dissenting). See also *Rolles* v. *Civil Service Comm'n*, 512 F.2d 1319, 1327 & nn.20-21 (D.C. Cir. 1975) (Wilkey, J.) (construing *Arnett*). Army officers, such as petitioner, below the rank of lieutenant colonel have employment entitlements similar to those granted civil service employees. While the statute under which petitioner was terminated mandated the discharge or retirement of any officer twice passed over for promotion to captain, major, or lieutenant colonel (10 U.S.C. § 3303(d) (1976)), Congress, when enacting that provision, made it clear that the promotion system was intended "to force out *incompetent* officers only" and that "every *qualified* Army officer is, in effect, *assured* of a career up to and including lieutenant colonel grade. . . ."[23] H.R. Rep. No. 640, 80th Cong., 1st Sess., *reprinted at* [1947] U.S. Code Cong. Serv. 1647, 1651.[24]

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[23] Indeed, the record below shows that, during a period recognized by the Court of Claims as "highly competitive" for Army officers, *Sanders*, *supra*, 594 F.2d at 821 (Nichols, J., concurring), the three selection boards which passed over petitioner promoted, respectively, 90.6, 82.1, and 80.8 percent of the candidates considered by them for promotion for the first time. A. 17a.

[24] Section 3303(d), under which petitioner was terminated, was recently repealed by § 204 of the Defense Officer Personnel Management Act and replaced by new statutory provisions which continue to require that twice-passed over officers be discharged or

Given this entitlement, due process requires, at the very least, that petitioner be accorded the right to a full post-termination trial to challenge the lawfulness of his termination when his case is in a reviewing court.[25] While the Court of Claims, on wholly separate grounds (see pp. 14-16, *supra*), affords such a hearing, it has, by refusing to give any weight to petitioner's case, rendered this procedural protection meaningless.

The question whether military personnel are entitled to any procedural due process upon termination from the armed services has been the subject of much debate in the lower courts.[26] The conflicting approaches by federal

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retired. See note 13, *supra*. Under the new statute, however, if on the date an officer would otherwise be discharged pursuant to these provisions, he is within two years of qualifying for retirement, he must be retained until qualified for retirement. *Id.*, § 105, 10 U.S.C.A. §§ 631(a)(3), 632(a)(3) (West Supp. 1980). Moreover, captains and majors twice passed up for promotion may, in the discretion of the Secretary and subject to the needs of the military, be continued on active duty. *Id.*, 10 U.S.C.A. § 637(a). This new statute thus provides expectations of continued employment over and above the entitlements granted under pre-1980 law, which "assured" competent officers "a career up to and including lieutenant colonel grade." [1947] U.S. Code Cong. Serv., *supra*, at 1651.

[25] See, *e.g.*, *Vitek* v. *Jones*, 445 U.S. 480, 494-97 (1980) (adversarial hearing must be provided to prisoner prior to his involuntary transfer to State mental hospital); *Ingraham* v. *Wright*, 430 U.S. 651, 672, 674-82 (1977) (due process is satisfied where students subject to corporal punishment have available common law judicial remedies to redress injuries should punishment be excessive); *Wolff* v. *McDonnell*, 418 U.S. 539, 563-68 (1974) (prior to taking of disciplinary actions against prisoners, prisoners must be provided oral hearing with right to call witnesses and present documentary evidence in their defense); *Morrissey* v. *Brewer*, 408 U.S. 471, 487-90 (1972) (prior to revocation of parole, parolee must be accorded opportunity for adversarial hearing).

[26] *Compare Neal*, *supra*, 639 F.2d at 1041 n.12 (*dictum*) (suggesting due process rights); *Buchanan*, *supra*, 621 F.2d at 375-80 (*dictum*) (showing entitlement to continued employment of regular and reserved Naval officers); *Rolles*, *supra*, 512 F.2d at 1326-28 & n.19 (D.C. Cir. 1975) (*dictum*) (Wilkey, J.) (§ 1552

courts to this issue and the issue's interrelationship with the scope of review applied below are additional reasons why this question is worthy of resolution by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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procedures are "constitutionally suspect"); *Suro* v. *Padilla*, 441 F. Supp. 14 (D.P.R. 1976) (finding due process right) *with Lane* v. *Secretary of Army*, 504 F. Supp. 39 (D. Md.), *aff'd mem.*, 639 F.2d 780 (4th Cir. 1980) (no right); *Blevins* v. *Plummer*, 613 F.2d 767 (9th Cir. 1980) (no right); *Diliberti* v. *Brown*, 583 F.2d 950 (7th Cir. 1978) (no right); *Knehans* v. *Alexander*, 566 F.2d 312 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 995 (1978) (no right); *Pauls* v. *Secretary of Air Force*, 457 F.2d 294 (1st Cir. 1972) (*dictum*) (no right). See also *Colm* v. *Vance*, 567 F.2d 1125, 1127-32 (D.C. Cir. 1977) (remand in similar statutory context (*i.e.*, foreign service officers) for property right determination). For a scholarly analysis contending that regular Army officers are entitled to procedural due process, *see* Ford, *Officer Selection Boards and Due Process of Law*, 70 Military L. Rev. 137 (1975).

Appendix

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JOHN M. GRIEG,
Petitioner,

v.

UNITED STATES OF AMERICA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 258-78

(Decided January 28, 1981)

JOHN M. GRIEG

v.

THE UNITED STATES

Neil B. Kabatchnick, attorney of record, for plaintiff. *Louis R. Davis*, with whom was *Assistant Attorney General Alice Daniel*, for defendant. *Lynn J. Bush*, attorney of record. *Major Scott Magers, Department of the Army*, of counsel.

Before KASHIWA, BENNETT, and SMITH, *Judges*.

OPINION

BENNETT, *Judge*, delivered the opinion of the court:

This is a military pay case in which plaintiff seeks to have the court void an OER and then grant further relief as a result of that correction of plaintiff's military records. We conclude that it would be improper to void the OER. Therefore, we hold for defendant. In doing so, we reverse the decision of the trial judge but accept

most of his findings.[1] Such findings of fact as are necessary to our decision are stated herein. This case again presents to the court important questions concerning our jurisdiction and permissible scope of review. It is on the interpretation and application of guidelines which have been laid down for the resolution of these cases that we respectfully differ with the learned trial judge. We think he has exceeded the court's authority. On the appealing facts of plaintiff's case, it is tempting to do so. But, we must be ever mindful that this is a court of limited jurisdiction.

Plaintiff entered on extended active duty on October 4, 1958, as a second lieutenant in the Army Reserve. He served on active duty thereafter continuously until November 1, 1973, reaching the rank of temporary major. He was an officer in the Regular Army almost all of this time and achieved a record noted for competent and faithful discharge of duty. He was discharged on November 1, 1973, pursuant to statute, after he was twice considered but not selected for promotion to the permanent grade of major. His claim is that the promotion nonselections were due to an erroneous officer effectiveness report (OER) covering the period from November 17, 1967, to February 20, 1968. He seeks back pay, correction of his records, promotion, placement on the retired list, and ancillary relief. Plaintiff has sought and been denied administrative relief by the Army under AR 623-105 and by the Army Board for the Correction of Military Records. The board considered plaintiff's application in executive session. He was not granted a hearing until he came to the court. His suit is timely.

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[1] The court rejects the trial judge's findings numbered 43(c) through 43(i), 44, 48(b) through 48(k), and his conclusion of law. The court's task in review of the record has been made unnecessarily difficult by defendant's failure to comply with our Rule 143(c) which requires that, "At the end of each exception to findings of fact, appropriate references shall be made to the parts of the record relied upon in support thereof."

Plaintiff was an Infantry officer who performed two tours of duty in Vietnam, and as leader of a Special Forces team was awarded the Bronze Star Medal, among others. Thereafter, and after completing an advanced Infantry officer career course at Fort Benning, Georgia, he was assigned to the Army Arctic Test Center at Fort Greely, Alaska. There he was made a test officer in the Infantry Airborne and Individual Equipment Test Division. Lt. Col. Alfred E. Williams was his division chief. Maj. Herbert Lee Gregg was senior test officer of the division and was plaintiff's OER rater. Lt. Col. Williams was plaintiff's OER indorser.

While at Fort Greely in August 1967, plaintiff received alert orders that he was being assigned to Vietnam for a third tour there and that he was to report no later than December 28, 1967. Plaintiff's wife and infant child had accompanied him to Fort Greely. His wife was upset at the prospect of a third tour in Vietnam because she was expecting another child in December 1967. She also knew of other officers who had not been called upon to do so much duty in Vietnam and resented what she believed was unjust treatment of her husband. Plaintiff was made aware of these feelings in no uncertain terms and, agreeing with her, tendered his resignation from the Army. The resignation was not accepted because of the continuing military need for his special qualifications. However, supplemental orders were issued changing his reporting date for the Vietnam assignment to March 25, 1968. He performed that third tour with distinction, winning two Oak Leaf Clusters for his Bronze Star.

There is no dispute about the high quality of plaintiff's service prior to receipt of the Vietnam alert notice. The OER rendered on his performance of duty from November 17, 1967, to February 20, 1968, however, contained some criticism. While praising plaintiff's superior tech-

nical competence and stating that in the rating period he had performed his assigned duties in a superior manner, the rater's comment also stated, in pertinent part:

> After the tests were completed, MAJ Greig failed to prepare the reports of tests in the proper format or within the required time frame. When questioned about the progress that he was making on the reports, he displayed a very negative attitude.

Plaintiff's indorser, Lt. Col. Williams, added the following comments on the OER:

> MAJ Grieg was a superior officer until he received his orders to Vietnam. The last 30 days that he was assigned to this Test Division his dependability was seriously affected. He conducted two arctic service tests during the test season and gathered adequate test data. One of the test reports he wrote had to be completely rewritten by other officers of this Test Division; the other test report had to have major modifications and corrections made on it. MAJ Grieg is capable of producing superior test reports as indicated by the reports he submitted for the previous test season. During MAJ Grieg's last 30 to 45 days that he was assigned to this test division he displayed a very negative attitude toward the Army.

The rater and indorser testified at the court trial and reiterated their views as expressed on plaintiff's OER. Plaintiff's testimony denied the factual accuracy of these comments and represented that because of his prospective departure from the Test Center that he, in fact, accelerated his work and completed it in proper form and content well before his scheduled departure date, and in sufficient time for its review by the division review board. At the trial, plaintiff's testimony was supported by that of a former subordinate, Jack C. Cook, Jr., and by Mrs. Grieg.

It is a fact that the review board found with respect to one of plaintiff's reports that it should include certain additional data plaintiff had developed, and amended it accordingly. Also, the reports were prepared in final form for distribution prior to plaintiff's departure from the Test Center.

The Army Electronics Command in a communication dated February 5, 1968, commended plaintiff's performance, referring among other things to his "great personal sacrifice" and to the "outstanding manner" in which plaintiff and his assistant cooperated to prevent delay and overcome technical difficulties. The communication concluded with the statement, "The very eminently satisfactory manner in which this mission was accomplished reflects most highly on Major Grieg's * * * capabilit[y] and * * * devotion to our nation's defense." The foregoing commendation was forwarded to plaintiff by the commanding officer of the Test Center, Col. Nabors, with a covering communication which praised plaintiff's performance and congratulated him "for a job outstandingly well done."

Plaintiff was considered but not selected for promotion to the permanent grade of major by Army selection boards that convened on January 24, 1972, and January 31, 1973. He was passed over for promotion to the temporary grade of lieutenant colonel, AUS, by a selection board that convened on September 5, 1972. Pursuant to law he was therefore discharged on November 1, 1973. On plaintiff's application he was appointed a major in the Army Reserve on October 12, 1973. The trial judge found that the principal factor in plaintiff's being passed over for promotion was the comparatively low OER that was rendered on him for the last 3 months of this tour of duty as a member of the division at the Test Center, Fort Greely, Alaska. Plaintiff received three OERs while at the Test Center. His composite score on the first one

was 203.7. The second was 209.1. The third one, here in issue, was 166.0. This represented a decline of 37.7 points compared with the first OER and 43.1 points when compared with the second. The low OER was the lowest composite score on any OER for plaintiff during his entire military service. Excluding this one OER, his composite scores for his entire service averaged 202.2. The low OER was prepared after plaintiff left Fort Greely and he did not see it until 1972 when he made inquiry after being passed over for promotion in that year.

Plaintiff's first challenge to the OER for the period November 17, 1967, to February 20, 1968, was on October 5, 1973, when he sought a correction of his record under the provisions of 10 U.S.C. § 1552 (1976) and AR 15-185 by an appeal to the Army Board for the Correction of Military Records. He did not pursue this appeal immediately because, as later discussed, he first sought to exhaust other administrative relief within the Army itself. However, he amended his appeal to the board when the other avenue of relief was unsuccessful and his application was considered on October 19, 1977, by the board in executive session. By letter of November 23, 1977, plaintiff was advised that the application for correction of his records was denied. The board decision stated, in part:

> DISCUSSION: From a review of the applicant's entire OER file it does appear that the OER in question [*i.e.*, for the period from 17 November 1967 to 20 February 1968] may have been the determining factor for his non-selection to the grades of Major-RA and LTC-AUS.

The board memorandum concluded with the remark that "the OER reflects a valid appraisal of the applicant's manner of performance during the period."

Plaintiff also filed, on February 7, 1974, an appeal under the provisions of AR 623-105 seeking to void the

low OER. The Infantry Branch of the Army did not support the appeal. A special review board in the office of the Deputy Chief of Staff for Personnel considered the appeal and rejected it on Febraury 27, 1974. It had before it plaintiff's representations and his record, and considered a memorandum furnished by Lt. Col. Williams, which was abbreviated in a so-called case summary that was very derogatory. In part it stated:

> b. MAJ Grieg was truly outstanding until he received word that he was to be reassigned to Viet-Nam, then he practically quit work. He spent most of time and energy attempting to get out of the Nam assignments. He spent considerable working time in telephoning DA and congressmen, and writing letters. "He flat went to pieces." Appellant told LTC Williams that he (MAJ Grieg) had a way out in that his wife would divorce him and refused to take their child; therefore, the Army would not send him to Viet-Nam. His attitude was negative.
>
> c. With respect to appellant's test reports, they were late in submission and in such condition that they had to be worked over. In fact LTC Williams had to redo some of the testing because the data was not complete. The format wasn't the problem, it was the substantive deficiencies that appellant was faulted for, LTC Williams did not ask MAJ Grieg to redo any of the work because it would not have done any good. The rework was done by several officers including the rater and indorser.

When the trial judge considered the documentary record in the case and the testimony presented to him, he rejected everything that did not support plaintiff's claim. He found the adverse statements on the OER by the rater and indorser factually inaccurate and as indicating a "prejudicial state of mind" toward plaintiff, "evidently due to the Vietnam assignment and the plaintiff's attempt to avoid it by submitting his resignation." He found

that the OER for the contested period "did not represent an accurate, objective, fair, or just evaluation of plaintiff's performance during such period." He concluded that the OER was "unfair and unjust" and "prejudicial" and that the record did not disclose any factor other than the challenged OER that might have caused plaintiff's passovers by the 1972 and 1973 permanent major selection boards. In this connection he noted the correction board's own statement that the weak OER "may have been the determining factor for his non-selection." Upon these determinations the trial judge reached this conclusion: "Therefore, *legal error* was committed when the 1972 and 1973 permanent major selection boards based their pass-overs of the plaintiff on records which contained the *unfair and unjust* OER for the period from November 17, 1967, through February 20, 1968." [Emphasis supplied.] The trial judge has recommended that the court award plaintiff back pay for active duty he would have performed had he not been illegally discharged, for back retired pay, and for the correction of his records to remove the contested OER and passovers. Promotion, of course, was correctly denied as beyond the court's jurisdiction.

The trial judge has repeatedly referred to the result in plaintiff's case before the correction board and selection boards as "unfair and unjust," *i.e.* an "injustice" which he equates with legal error, as shown by the above quotation from his opinion. He cites just two cases in support of his proposition. *Riley* v. *United States*, 221 Ct. Cl. ——, ——, 608 F.2d 441, 443 (1979), and *Skinner* v. *United States*, 219 Ct. Cl. 322, 330-31, 594 F.2d 824, 829 (1979). Those cases do not support the proposition that the court can overturn selection boards and correction boards because something that they have done or failed to do is simply "unfair and unjust." Those were cases in which pure legal error was committed and there are many cases proclaiming our jurisdiction to correct such errors. Capt. Riley was passed over for promo-

tion because of two OERs which were voided by a review board. The correction board refused his request to remove the passovers. This was legal error because under the statutes, 10 U.S.C. §§ 3442(c), 8442(c) (1976), an officer is entitled to be considered on a record that accurately portrays his career. The record was erroneous by the decision and admission of the Air Force itself. It was also shown that with these illegal OERs out of his file plaintiff was in the competitive zone for promotion. The legal error in *Skinner* was the illegal use of command influence on the rater, arising from information the rater and indorser confessed was erroneous. This violated the same statutes as in *Riley*. The court in *Skinner* ruled:

> * * * It takes more than an unfair rating or simple injustice to merit our consideration or judicial relief. It must be an unlawful act made so by violation of statute, or regulation, or published mandatory procedure, or unauthorized act, or so unsupported by the evidence as to be a gross injustice, unlawful because of clear legal or factual error, manifest abuse of discretion, or arbitrary and capricious action amounting to bad faith or fraud, and seriously prejudicial. [Citations omitted.] [219 Ct. Cl. at 333, 594 F.2d at 830.]

The same day that *Skinner* was decided, the court *en banc* decided *Sanders* v. *United States*, 219 Ct. Cl. 285, 594 F.2d 804 (1979). In that case there was also plain legal error. The correction board removed certain improper OERs from Capt. Sanders' file but did not remove, as he requested, the passovers that they had occasioned. Had it done so, it was evident he would have been promoted because he was next in line for it. The court unanimously concluded that he had been discharged by reason of legal error. An officer is entitled to the pay of the position to which he was appointed until legally removed. 37 U.S.C. § 204 (1976).

The *Sanders* court did not entirely rule out the possibility that somewhere down the road in the future there might be such an error or injustice so shocking to the conscience and ignored by a correction board that evidence could show it rose to the level of legal error necessary for the court to remedy it. As yet, the court has encountered no such cases, post *Sanders* and *Skinner*. One thing is clear, the court cannot itself correct a simple injustice or direct a correction board to do so, without the correction implementing a money judgment. *Black* v. *United States*, Ct. Cl. No. 238-74 (order entered April 18, 1980). Correction boards have the authority by statute to remove or correct an error or injustice. 10 U.S.C. § 1552(a) (1976). The statute says: "Except when procured by fraud, a correct under this section is final and conclusive on all officers of the United States." An example of the correction of an injustice may be illustrated, for instance, where the board orders a promotion or changes the character of a soldier's discharge from dishonorable to honorable as a matter of clemency to correct a factual but not necessarily a legal error. The court cannot do this because it does not involve a monetary claim, but is equitable in nature. The court said in *Sanders*:

> * * * Once a plaintiff has sought relief from the Correction Board, such plaintiff is bound by that board's determination unless he can meet the difficult standard of proof that the Correction Board's decision was illegal because it was arbitrary, or capricious, or in bad faith, or unsupprted by substantial evidence, or contrary to law, regulation, or mandatory published procedure of a substantive nature by which plaintiff has been seriously prejudiced, and money is due. [219 Ct. Cl. at 298, 594 F.2d at 811.]

The court also said in that case:

> * * * To recover for failure to correct an alleged injustice, such as perhaps based on gross material error of fact or an action contrary to all evidence, it must be proved that such failure was arbitrary and capricious, or in bad faith, or contrary to law, or without rational basis, seriously prejudicial to plaintiff, and with monetary consequences. In such event, the abuse of administrative discretion rises to the level of legal error which merits judicial relief. These are comparatively rare cases. [Citations omitted.] Perhaps they are infrequent because the proof must overcome the strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith. [Citations omitted.] Strong policies compel the court to allow the widest possible latitude to the armed services in their administration of personnel matters. * * * Thus, while we may disagree with a correction board about whether or not a specific situation was unjust, we will not substitute our judgment for the board's when reasonable minds could reach differing conclusions. *Snell* v. *United States*, 168 Ct. Cl. 219, 227 (1964). [*Sanders*, 219 Ct. Cl. at 301-02, 594 F.2d at 813-14.]

Concurring in the *Sanders* result but writing separately, Judge Nichols, joined by Judge Smith, would not admit that there was any right to judicial review except for legal error. Claims of "injustice" were described as moral claims for clemency, but not within the court's jurisdiction to decide or to require the correction board to decide "no matter how arbitrary or capricious, in merely moral cases." 219 Ct. Cl. at 319, 594 F.2d at 823 (Nichols, J., concurring). The majority opinion acknowledged this difficulty in stating:

> Where a correction board fails to correct an injustice or a passover is challenged but a back pay claim has not arisen, plaintiff's remedies, if any, would be in the district court by mandamus, 28 U.S.C. § 1361, or declaratory judgment, 28 U.S.C. § 2201. [*Sanders*, 219 Ct. Cl. at 296 n.10, 594 F.2d at 810 n.10.]

It is unnecessary here to belabor these now well-settled rules of law and to cite or discuss the cases supporting the same, as set forth in the precedents cited above. What is necessary now is to see if plaintiff has met the strict and difficult tests of *Skinner* and *Sanders*, subsequently reaffirmed in several decisions, including the recent one of *Hary* v. *United States*, 223 Ct. Cl. ——, 618 F.2d 704 (1980).

We think without doubt that plaintiff has failed to meet the tests. The trial judge has not shown us that what he found to be an unjust OER amounted to legal error. He weighed the testimony of plaintiff and his wife, of plaintiff's friend and subordinate, Mr. Cook, and the evidence of the commendation of the Electronics Command and its indorsement by an officer not in the rating chain for this particular OER, compared the challenged OER with others plaintiff received, and concluded that there was substantial evidence of prejudice and error of fact so as to make an "unfair and unjust" OER into one written in legal error. He also gave weight to the speculation of the correction board that the OER "may have been the determining factor for his nonselection" to the grade of major, but he did not note that the correction board also said that the OER constituted a "valid appraisal" of plaintiff's performance of duty during the rating period which it covered. "A finding of probable error or injustice cannot be based on mere speculation." *Hary* v. *United States*, *supra*, 223 Ct. Cl. at —— n.18, 618 F.2d at 711 n.18.

The trial judge heard the evidence, evaluated plaintiff's performance, and concluded that the OER for the period in dispute did not accurately reflect plaintiff's performance. A contrary conclusion would have been equally plausible and well supported. As defendant persuasively argues, the Army Electronics Command commendation of plaintiff's work and the letter by the Test Center commander, Col. Nabors, which forwarded that commendation to the plaintiff, do not represent an evaluation of plaintiff's performance for officer effectiveness report purposes. Those personnel were not legally responsible for monitoring plaintiff's work from day to day, and making an evaluation of that work for the military.

Similarly, plaintiff's record for prior and subsequent periods cannot negate the evaluation for the OER period in dispute. The rater and indorser recorded their evaluation of plaintiff's performance for that period. These were the individuals who had the legal responsibiilty to rate plaintiff and who were in a position to observe his performance on a daily basis. They exercised their discretion and judgment in rendering the evaluation, and their evaluation is entitled to a presumption of correctness. *Hary* v. *United States*, *supra*, 223 Ct. Cl. at ——, 618 F.2d at 707; *Guy* v. *United States*, 221 Ct. Cl. ——, ——, 608 F.2d 867, 870 (1979); *Sanders* v. *United States*, *supra*, 219 Ct. Cl. at 302, 594 F.2d at 813. The rater and indorser reiterated and reaffirmed their criticism of plaintiff's performance during the rating period in issue when they testified in this court. As the court stated in *Guy* v. *United States*, *supra*, 221 Ct. Cl. at ——, 608 F.2d at 870-71:

> * * * perfect objectivity in the rating process cannot be expected or even hoped for. The process of evaluating officers by other officers is an inherently subjective process which neither the military boards

> nor this court will interfere with unless there is clear and convincing evidence of factors adversely affecting the ratings which had *no business being in the rating process.* * * * [Emphasis in original.]

See also, Hary v. *United States, supra,* 223 Ct. Cl. at ——, 618 F.2d at 708. There is no evidence that such improper factors affected the challenged OER.

In addition, the trial judge seems to have approached this case as one in which he could evaluate the plaintiff's performance during the period from November 17, 1967, to February 20, 1968, and reach a conclusion based solely on the weight of evidence as he saw it. However, the Army Board for the Correction of Military Records decided that the OER in question represented a "valid appraisal" of the plaintiff's performance for the period in question. That conclusion is entitled to finality unless arbitrary, or capricious, or unsupported by the evidence. *Skinner* v. *United States, supra,* 219 Ct. Cl. at 332, 594 F.2d at 830. As the court stated in *Cooper* v. *United States,* 203 Ct. Cl. 300, 304-05 (1973):

> * * * This court cannot overturn the * * * decisions of the Army Board for the Correction of Military Records unless they are found to be arbitrary, capricious, and not based upon substantial evidence, or are contrary to applicable laws and regulations. *Dorl* v. *United States,* 200 Ct. Cl. 626, *cert. denied,* 414 U.S. 1032 (1973). This showing requires cogent and clearly convincing evidence. *Newman* v. *United States,* 185 Ct. Cl. 269, 276 (1968); *Stephens* v. *United States,* 174 Ct. Cl. 365, 372, 358 F.2d 951, 954 (1966). There is a strong presumption that the board and the Secretary faithfully discharged their duties and the burden is upon plaintiff to prove otherwise. *Callan* v. *United States,* 196 Ct. Cl. 392, 450 F.2d 1121 (1971); *Biddle* v. *United States,* 186 Ct. Cl. 87 (1968). * * *

The trial judge does not appear to have evaluated the evidence in light of that standard of review. The failure of the trial judge to analyze the evidence within the proper scope of review deprives his recommended opinion of the presumption of correctness to which it would otherwise be entitled. In addition, the passage of years, 11 years from the performance evaluated to the date of trial in this court, weighs heavily against the plaintiff's efforts to overcome the OER. Slight variations between the evaluation 11 years ago and the rater and indorser's testimony in this court must be expected, given the lapse of time and the frailty of human memory. But, the plaintiff must establish a "misstatement of a significant hard fact," *Hary* v. *United States*, *supra*, 223 Ct. Cl. at ——, 618 F.2d at 708, or "gross material error of fact or an action contrary to all evidence," *Sanders* v. *United States*, *supra*, 219 Ct. Cl. at 301, 594 F.2d at 813, or that the decision of the correction board is "so unsupported by the evidence as to be a gross injustice," *i.e.*, clearly erroneous, *Skinner* v. *United States*, *supra*, 219 Ct. Cl. at 333, 594 F.2d at 830. Plaintiff has simply failed to meet its burden in this case in order to overcome the OER and the correction board decision.

The cold reality of the situation is that it will always be difficult to overcome the discretionary judgments and evaluations by the rater and indorser, especially many years after the performance was reported. However, this is as it should be. This court is not here to second-guess them. Further, "we will not substitute our judgment for the board's when reasonable minds could reach differing conclusions." *Sanders* v. *United States*, *supra*, 219 Ct. Cl. at 302, 594 F.2d at 814. We do not run the military services. *Orloff* v. *Willoughby*, 345 U.S. 83 (1953). The court said in *Reale* v. *United States*, 208 Ct. Cl. 1010, 1013, *cert. denied*, 429 U.S. 854 (1976):

> Plaintiff sees us as made into a sort of super Correction Board by Pub. L. 92-415, supra. We do

> not agree. We are given power to order correction of records, and reinstatement but only to make the relief complete as to matters within our jurisdiction, not to exercise discretion for the Service Secretaries and take over the functions of Correction Boards.

Any course other than the one stated would permit an officer to challenge his OERs by bringing in his self-serving testimony and that of his wife and friends not in the rating chain, to upset those OERs, and thus render the entire military promotion and rating system a farce by destroying its integrity. Show us a clear, legal error and we can cope with it. We do not have one here. There was substantial evidence to support the OER as given to plaintiff. It was not, therefore, arbitrary and capricious for the correction board not to change it. It is the rater's view that counts in the end, absent legal error. OERs are discretionary matters in which the court must be scrupulous about its intervention. *Boyd* v. *United States*, 207 Ct. Cl. 1, *cert. denied*, 424 U.S. 911 (1976). In the face of the presumption that the OER is correct because the rater is presumed to have acted in good faith, "plaintiffs must do more, to invoke court intervention, than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense." *Hary* v. *United States*, *supra*, 223 Ct. Cl. at ——, 618 F.2d at 708. And, as further stated in the latter case, "merely because the Correction Board voids an OER, it is not automatically obligated to void any passover emanating from a selection board that had a defective OER before it. The officer must show that the presence of the defective OER made his whole record before the selection board something less than 'substantially complete and fair.'" Here, unlike in *Skinner*, for instance, there is no concession by the rater or indorser that the rating was factually wrong. Also, this case is

unlike *Sanders* because in that case the correction board had voided four OERs. Further, there is no showing of plaintiff's relative standing to others waiting in line for promotion or at what point there was a "cutoff." The best we have is the correction board's speculation that the challenged OER *might* have made a difference. But, since it stated also that the OER was correct we cannot give plaintiff back pay. Except for an inference of potential prejudice by the rater, not supported by this record, the fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied. A clear nexus between the OER and plaintiff's serious possibility of promotion is lacking in the record. *Cf. Guy* v. *United States, supra.* The statistics supplied in the findings of the trial judge show that several hundred officers were considered but not selected by the permanent major selection boards that considered plaintiff for promotion on January 24, 1972, and January 31, 1973, as follows:

	1972	*1973*
Number considered	1917	1922
Number selected	1652	1480
Percent selected	86.2	77.0
"Fresh Zone" considered*	1721	1774
"Fresh Zone" selected	1560	1457
Percent "Fresh Zone" selected	90.6	82.1

* Officers considered for the first time.

The statistics for the September 5, 1972, temporary lieutenant colonel selection board that considered, but did not select, plaintiff are even more striking:

Number considered	1953
Number selected	736
Percent selected	69.9
"Fresh Zone" considered	850
"Fresh Zone" selected	687
Percent "Fresh Zone" selected	80.8

We think plaintiff can derive small comfort from these statistics. Plaintiff's main argument is that since the trial judge saw the witnesses and had a chance to judge their credibility, and the correction board had no hearing, the presumption in favor of the decision and findings of the trial judge has to be decisive. Indeed, it would be if he found a legal error. But, his conclusion that what he believed to be an "unfair and unjust" OER is necessarily legal error is not supported by the statutes, regulations, or prevailing case law. In his zeal to do justice as he saw it, he innocently went beyond the permissible scope of review by acting as a correction board and by substituting his judgment of plaintiff's performance of duty for that of the plaintiff's rating and indorsing officers, reflected on the OER, which constituted substantial evidence before the board, even though some aspects thereof might be subject to differences of opinion between reasonable minds.[2] Under the law, as set forth in our cases, this is not good enough to constitute legal error which would permit the court to overturn the administrative determination, as plaintiff here requests.

Plaintiff argued this case to the trial judge as if this court were sitting as a super correction board with authority to correct what are merely alleged inaccuracies in a challenged OER. We read the trial judge's opinion as adopting that view. The trial judge said that:

> A military officer is legally entitled to be considered by a selection board for promotion on the basis of a record that fairly portrays the career of the officer in the military service.

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[2] When the trial judge drafted his recommended opinions, he had the benefit of the plaintiff's 276-page proposed findings of fact and brief. However, he did not have before him any proposed findings, brief, or response from the defendant. See the court's previous order in this case. *Grieg* v. *United States*, Ct. Cl. No. 258-78 (order entered May 9, 1980). Thus, the one-sidedness of the record before the trial judge may have contributed to the outcome below.

In this he was correct. The law provides that appointments to higher grades are to be made on a "fair and equitable basis," 10 U.S.C. §§ 3442(c), 8442(c) (1976). However, this laudable, legal standard does not automatically convert every factual error to legal error. The plaintiff's claim in this case relies upon proof that the challenged OER was materially in error so as to warrant judicial relief. But, as we have shown, reasonable minds can differ on the evidence here. Where that is so, we can go no further. We have analyzed the case under the proper standards for granting relief for factual error and conclude that the evidence was insufficient to overturn the presumptions which support the OER in this case. Therefore, the petition is dismissed.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

No. 258-78

(Filed April 14, 1980)

JOHN M. GRIEG

v.

THE UNITED STATES

Military pay; officer efficiency rating; selection board pass-overs; release from active duty; correction board; damages.

Neil B. Kabatchnick, attorney of record, for plaintiff. *LeRoy Southmayd, Jr.*, with whom was *Assistant Attorney General Alice Daniel*, for defendant.

OPINION *

WHITE, *Senior Trial Judge*: The plaintiff, who served on extended active duty as an Army officer for more than 15 years, sues in the present case because of the allegedly wrongful termination of his extended active duty on November 1, 1973. At the time of such termination, the plaintiff was a member of the Regular Army,

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* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

serving in the permanent grade of captain and in the temporary grade of major. He was released from active duty because he had been passed over twice by selection boards, first in 1972 and subsequently in 1973, for promotion to the permanent grade of major in the Regular Army.

The plaintiff alleges that the two pass-overs mentioned in the preceding paragraph, and the resulting release from active duty, where due to an erroneous and unjust officer efficiency rating ("OER") which was rendered on the plaintiff for the period from November 17, 1967, to February 20, 1968, and which was among the papers before the 1972 and 1973 selection boards when they considered the plaintiff for promotion to the permanent grade of major.

On October 5, 1973, the plaintiff filed with the Army Board for Correction of Military Records ("the Board") an application for the correction of his military records under the provisions of 10 U.S.C. § 1552 and Army Regulation 15-185. In the application, as amended, the plaintiff requested (among other things): the voiding of the OER for the period from November 17, 1967, to February 20, 1968; the voiding of the plaintiff's failure of selection for promotion to the permanent grade of major by the 1972 and 1973 selection boards; and the correction of the plaintiff's military records to show that he was selected for promotion to the permanent grade of major by the 1972 selection board and was thereafter promoted to the permanent grade of major, with a designation of an appropriate date of rank.

The plaintiff's application was considered on October 19, 1977, by the Board in executive session. The application was denied by the Board, without granting the plaintiff a hearing on this application.

The present action was instituted by the plaintiff on May 26, 1978.

During the critical period that is involved in the present litigation (*i.e.*, from November 17, 1967, to February 20, 1968), the plaintiff was assigned to duty as a test officer in the Infantry, Airborne, and Individual Equipment Test Division ("the Division") at the Army's Arctic Test Center ("the Test Center"), Fort Greely, Alaska. This assignment began in June 1966.

Before reporting to the Test Center in June 1966, the plaintiff's professional career as an Army officer had been quite successful. This had included two tours of duty in Vietnam. The first tour of duty there was as an Infantry officer from December 2, 1961, until November 26, 1962. The second tour of duty in Vietnam was for a 6-month period that began in the latter part of 1963 and extended into 1964. During this 6-month period, the plaintiff was the leader of a Special Forces team operating in the Vietnamese jungle (the Army Special Forces being an elite element that specializes in counter-insurgency operations in hostile territory). On the basis of his performance as the leader of the Special Forces team, the plaintiff was awarded the Bronze Star Medal for "distinguishing himself by outstanding meritorious service in connection with ground operations against a hostile force."

After completing in June 1965, a tour of duty in Okinawa as a member of the 1st Special Forces Group, the plaintiff was assigned to Fort Benning, Georgia, where he took and successfully completed the advanced Infantry Officers Career Course. Upon graduating from this course, the plaintiff was assigned to the Test Center; and, as previously indicated, he reported for duty there in June 1966.

The plaintiff was accompanied to Alaska by his wife and their one child, who was approximately 2 months old at the time.

The plaintiff's work as a test officer at the Test Center prior to November 17, 1967, was highly regarded by his superiors. The OER that was rendered on the plaintiff for the period from June 2, 1966, to June 1, 1967, gave the plaintiff a composite score of 203.7; and his OER for the period from June 2, 1967, to November 16, 1967, gave him a composite score of 209.1.

By contrast, the OER that was rendered on the plaintiff for the period from November 17, 1967, to February 20, 1968, gave the plaintiff a composite score of only 166.0, which was, by a substantial margin, the lowest composite score on any OER for the plaintiff during his entire military service. Adverse comments were added to the OER by the rater and the indorser. These comments related to events which occurred after the plaintiff learned in August 1967 that he was being ordered back to Vietnam for further duty and would be required to report there not later than December 28, 1967.

As the plaintiff's wife was expecting to give birth to their second child in December 1967 (when the plaintiff was supposed to go to Vietnam for the third time), as their first child was not yet 16 months old, and as the plaintiff's wife was acquainted with other Army officers who had less service in Vietnam than the plaintiff, the plaintiff's wife was upset and angry over what she regarded as the unfair and unjust treatment of her husband on being ordered back to Vietnam for a third tour of duty. She conveyed her feelings to the plaintiff.

On August 14, 1967, the plaintiff tendered to the Department of the Army, through channels, his unqualified resignation as an Army officer, "to be effective by June 1968 or earlier."

After submitting his formal resignation, the plaintiff telephoned the Infantry Officers Assignment Branch at Army Headquarters in Washington, D.C., and orally informed that office regarding the submission of his resignation. The Assignment Branch responded that the plaintiff's resignation would not be accepted. The plaintiff then orally requested that the date for his reporting to Vietnam be postponed in view of the expected birth of a child to his wife in December 1967; and the plaintiff was advised that a postponement of his reporting date would be granted. Later, the plaintiff's resignation as an Army officer was formally rejected by the Department of the Army.

On October 18, 1967, supplemental orders were issued which changed the date on which the plaintiff was to report in Vietnam from December 28, 1967, to March 25, 1968. These orders further provided that the plaintiff and his dependents were to depart from Fort Greely on February 20, 1968, for Chicago, Illinois; and that the plaintiff, after a month's leave, was to report on March 23, 1968, to a designated Army base on the West Coast for transportation to Vietnam.

When the plaintiff learned definitely that his resignation from the Army was not accepted, and that it would be necessary for him to go back to Vietnam for another tour of duty in any event, he undertook to accelerate the completion of the assignments on which he was working at the Test Center, so that they could be completed before February 20, 1968, the date on which he and his family were to leave Alaska.

The plaintiff's principal assignments at the time related to the testing under arctic conditions, evaluating, and reporting on a "starlight scope," which was a night-vision system to enhance the ability of Infantry personnel to see in the nighttime, and a survival kit for use by Infantry personnel. The plaintiff was in charge of

these projects. Under normal operating conditions at the Test Center, the testing of the items mentioned would have been accomplished during the winter months of 1967-68, and the preparation of the reports would have been undertaken in about April 1968, after the end of the severe winter weather in the Fort Greely area of Alaska. Because of the plaintiff's prospective departure from the Test Center on February 20, 1968, the plaintiff, after completing the testing of the starlight scope and the survival kit in the field, promptly began the preparation of his reports. By accelerating the work, he was able to complete the reports in draft form well in advance of his February 20 departure date, and in sufficient time for the Division review board (which consisted of all the Division officers, other than the chief of the Division, and included the plaintiff) to review the reports, in accordance with the customary procedure, prior to the plaintiffs departure.

The Division review board (which included the plaintiff) devoted a period of days to the draft reports which the plaintiff had prepared on the starlight scope and on the survival kit. The review board found the draft report on the starlight scope to be satisfactory, both as to format and as to content. With respect to the draft report on the survival kit, the review board found it to be satisfactory as to format, but concluded that it did not include certain data which the plaintiff had developed during the testing process and which other members of the review board regarded as pertinent to the evaluation of the item. Such data were included in the report by the review board.

By virtue of the plaintiff's action in accelerating the preparation of the draft reports on the starlight scope and the survival kit, and the intensive work on the reports done by the Division review board (which included the plaintiff), the reports were completed in final form

and typed on mats (for reproduction and distribution) prior to the time when the plaintiff left the Test Center.

The work done by the plaintiff (and another officer who assisted him) in connection with the testing of the starlight scope was commended by the Army Electronics Command in a communication dated February 5, 1968. This communication referred (among other things) to the "great personal sacrifice" of the plaintiff (and his assistant) and to the "outstanding manner" in which the plaintiff (and his assistant) cooperated to prevent delay and overcome technical difficulties. The communication concluded with the statement that "The very eminently satisfactory manner in which this mission was accomplished reflects most highly on Major Grieg's * * * capabilit[y] * * * and * * * devotion to our nation's defense."

The commendation mentioned in the preceding paragraph was forwarded to the plaintiff by the commanding officer of the Test Center, with a covering communication which stated in part as follows:

> 2. It is apparent from the attached correspondence that your contribution to these tests does indeed merit recognition. You can be justifiably proud to have completed the tests with the many unexpected difficulties due to major design deficiencies. Your resourcefulness and tenacity in the collection of additional data will permit the design engineers to improve upon the items tested.
>
> 3. I add to Mr. Thonen's comments that your entire tenure as a test officer has been worthy of such recognition, all tests having been conducted under adverse conditions which you overcame to successfully complete your assignments. Please accept my congratulations for a job outstandingly well done.

The plaintiff's career-low OER for the period from November 17, 1967, to February 20, 1968 (which was

prepared after the plaintiff's departure from Alaska and not shown to him) was, of course, inconsistent with the commendations from the Army Electronics Command and from the commanding officer of the Test Center that covered the plaintiff's performance during the same period of time.

As previously stated, the OER in question contained adverse comments by the rater and indorser. Such comments will be set out separately and commented on in the light of the evidence adduced at the trial.

The rater stated (among other things) that "after the tests [on the starlight scope and the survival kit] were completed, MAJ Grieg failed to prepare the reports of tests in the proper format or within the required time frame." This statement was not correct. The Division review board found that both reports were prepared in the proper format. Also, the reports, instead of being delinquent as to time, were prepared by the plaintiff ahead of the customary time schedule.

The rater also stated on the OER that "When questioned about the progress that he [the plaintiff] was making on the reports, he displayed a very negative attitude." This statement was not correct. The plaintiff made a special effort to complete the reports ahead of the usual time schedule; he made good progress in this respect; there was no occasion to question him about progress; and the statement that he displayed a negative attitude in the matter is contradicted by the evidence in the record.

The indorser stated (among other things) on the OER that "The last 30 days that he [the plaintiff] was assigned to this Test Division his dependability was seriously affected." This statement was not correct. It is contradicted by the evidence in the record.

The indorser also stated on the OER that "One of the test reports he [the plaintiff] wrote had to be completely rewritten by other officers of this Test Division * * *." This statement was not correct. Neither of the plaintiff's draft reports was completely rewritten by other officers of the Division.

The indorser further stated that "the other test report had to have major modifications and corrections made on it." This statement was misleading. What happened was that the Division review board decided that additional data, which the plaintiff had developed, should be included in one report, and this was done.

The indorser also stated on the OER that "During MAJ Grieg's last 30 to 45 days that he was assigned to this test division he displayed a very negative attitude toward the Army." This statement was not correct. It was evidently based on the circumstance that the plaintiff submitted his unqualified resignation as an Army officer under the circumstances previously outlined in the opinion, *i.e.*, the plaintiff understood that he would have to leave for a third Vietnam tour of duty in the same month when his wife was expected to give birth to their second child, and he was acquainted with other Army officers those length of service in Vietnam did not equal the time that he had already spent there.

The several adverse statements on the OER by the rater and the indorser that were factually inaccurate indicate a prejudicial state of mind at the time toward the plaintiff; and this was evidently due to the Vietnam assignment and the plaintiff's attempt to avoid it by submitting his resignation. It was not any actual deficiency in the plaintiff's performance of duty during the period from November 17, 1967, to February 20, 1968, that led the rater and indorser to give the plaintiff a career-low OER for such period.

The evidence in the record shows, and it is found, that the OER for the period from November 17, 1967, to February 20, 1968, did not represent an accurate, objective, fair, or just evaluation of plaintiff's performance during such period.

It perhaps should be mentioned that the plaintiff, after leaving the Test Center, actually served in Vietnam on a third tour of duty from March 25, 1968, to March 10, 1969. During this tour of duty, he was assigned to the 82nd Airborne Division; and he was awarded two Oak Leaf Clusters for his Bronze Star Medal on the basis of meritorious service.

Upon concluding his 1968-69 tour of duty in Vietnam, the plaintiff served for approximately 4 years in Europe, first with the Seventh Army in Germany and then with the Southern European Task Force of the Army in Italy.

After the plaintiff was passed over twice by selection boards for promotion to the permanent grade of major, he was returned to the United States in order that his required release from active duty might be accomplished in this country. The release occurred on November 1, 1973.

A military officer is legally entitled to be considered by a selection board for promotion on the basis of a record that fairly portrays the career of the officer in the military service. *Sanders* v. *United States*, 219 Ct. Cl. ——, ——, 594 F.2d 804, 814 (1979); *Riley* v. *United States*, 221 Ct. Cl. ——, ——, 608 F.2d 441, 443 (1979). Therefore, legal error was committed when the 1972 and 1973 permanent major selection boards based their pass-overs of the plaintiff on records which contained the unfair and unjust OER for the period from November 17, 1967, through February 20, 1968. *Skinner* v. *United States*, 219 Ct. Cl. ——, ——, 594 F.2d 824, 829 (1979); *Riley* v. *United States*, *supra*, 221 Ct. Cl. at ——, 608 F.2d at 443.

Of course, a harmless error committed in the selection process would not be actionable. *Guy* v. *United States*, 221 Ct. Cl. ——, ——, 608 F.2d 867, 872 (1979); *Riley* v. *United States*, *supra*, 221 Ct. Cl. at ——, 608 F.2d at 443-44. Harmless error, in this respect, means that, according to the evidence, it is unlikely that the officer against whom an error in the selection process was committed would have been promoted in any event. *Sanders* v. *United States*, *supra*, 219 Ct. Cl. at ——, 594 F.2d at 818.

In the present case, the evidence in the record does not disclose any factor, other than the unfair and unjust OER for the period from November 17, 1967, to February 20, 1968, which might have caused the plaintiff's pass-overs by the 1972 and 1973 permanent major selection boards. As previously stated, the plaintiff's composite rating of 166.0 on that OER was, by a substantial margin, the lowest composite rating ever received by the plaintiff during his entire service as an Army officer. Excluding the OER for the period from November 17, 1967, to February 20, 1968, the composite scores on the OER's that were rendered on the plaintiff during his entire active military service averaged 202.2. In this situation, it must necessarily be concluded that the 1972 and 1973 pass-overs by the permanent major selection boards were due to the unfair and unjust OER for the period from November 17, 1967, to February 20, 1968, and therefore, that this OER was highly prejudicial to the plaintiff in causing the two pass-overs and his release from extended active duty. *Cf. Sanders* v. *United States*, *supra*, 219 Ct. Cl. at ——, 594 F.2d at 815; *Riley* v. *United States*, *supra*, 221 Ct. Cl. at ——, 608 F.2d at 444.

In this connection, it may appropriately be noted that the Board, in denying the plaintiff's application for the correction of his military records with respect to the pass-overs by the 1972 and 1973 permanent major selec-

tion boards, stated that "the OER in question [*i.e.*, for the period from November 17, 1967, to February 20, 1968] may have been the determining factor for his non-selection * * *."

Under the circumstances, the failure of the Board to void the unfair and unjust OER and to remove from the plaintiff's records the two pass-overs by the 1972 and 1973 permanent major selection boards must be regarded as constituting arbitrary and capricious action, as unsupported by substantial evidence, and as contrary to law. *Yee* v. *United States*, 206 Ct. Cl. 388, 397, 512 F.2d 1383, 1387 (1975); *Riley* v. *United States*, *supra*, 221 Ct. Cl. at ——, 608 F.2d at 444.

As the plaintiff's two pass-overs for promotion to the permanent grade of major were based upon the illegal decisions of the 1972 and 1973 selection boards, the plaintiff's release from active duty because of such pass-overs was illegal. *Yee* v. *United States*, *supra*, 206 Ct. Cl. at 398, 512 F.2d at 1388; *Riley* v. *United States*, *supra*, 221 Ct. Cl. at ——, 608 F.2d at 443.

The plaintiff, having been illegally released from active duty on November 1, 1973, is entitled under 37 U.S.C. § 204 to recover an amount representing the active duty pay and allowances of the grade (major) in which he was then serving, such pay and allowances to cover the period beginning on November 2, 1973, and extending until such time as he would have been released from active duty in the absence of the illegal pass-overs by the 1972 and 1973 permanent major selection boards, less proper off-sets. *Sanders* v. *United States*, *supra*, 219 Ct. Cl. at ——, 594 F.2d at 810. It appears, in this connection, that the plaintiff, in the absence of the two illegal pass-overs from promotion to the permanent grade of major, would not have been released from active duty

until he qualified on October 4, 1976, for retired pay on the basis of length of service.

The plaintiff is also entitled to recover an amount representing the retired pay of a major from the date on which he would have been retired—*i.e.*, October 5, 1976—until the date of judgment.

In the petition, the plaintiff seeks an order from the court directing the Secretary of the Army to correct the plaintiff's military records so as to show that the plaintiff was selected for promotion to the permanent grade of major by the 1972 permanent major selection board and was thereafter promoted to the permanent grade of major; that the plaintiff was selected for promotion to the temporary grade of lieutenant colonel by the temporary lieutenant colonel selection board that met on September 5, 1972,[1] and was subsequently promoted to the temporary grade of lieutenant colonel; and that the plaintiff thereafter retired in the grade of lieutenant colonel on October 5, 1976. These portions of the prayer in the plaintiff's petition cannot be granted by the court. As the plaintiff has not shown that he was entitled, as a matter of legal right, to the promotions which he now seeks, the court does not have jurisdiction to grant such promotions. *Yee* v. *United States*, *supra*, 206 Ct. Cl. at 399, 512 F.2d at 1388; *Sanders* v. *United States*, *supra*, 219 Ct. Cl. at ——, 594 F.2d at 816; *Guy* v. *United States*, *supra*, 221 Ct. Cl. at ——, 608 F.2d at 874.

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[1] The temporary lieutenant colonel selection board of September 1972, in considering and passing over the plaintiff for promotion to temporary lieutenant colonel, did so on the basis of records that contained the unfair and unjust OER for the period from November 17, 1967, to February 20, 1968.

FINDINGS OF FACT

1. Plaintiff is a citizen of the United States and a resident of the State of Maryland.

2. (a) Plaintiff was born on 21 July 1931 in Chicago, Illinois. He was 46 years of age at the time of the filing of the petition on 26 May 1978.

(b) Plaintiff is married and has two children.

(c) Plaintiff's social security number and service number is 334-26-9139.

3. (a) Plaintiff served in an enlisted status in the Army Reserve (but not on active duty) from 25 November 1952 to 25 February 1954.

(b) Plaintiff served on extended active duty in an enlisted status from 26 February 1954 to 24 February 1956.

4. (a) Following the period of active military duty referred to in finding 3(b), plaintiff served in an enlisted status in the Army Reserve (but not on active duty) from 25 February 1956 to 13 June 1958. During the latter period, plaintiff was a student at Iowa State University. He was a member of the Army Reserve Officers' Training Corps ("ROTC") at that institution.

(b) Plaintiff graduated from Iowa State University in 1958 with a bachelor of science degree in agriculture.

(c) By virtue of his work in the ROTC program, plaintiff was rated as a Distinguished Military Graduate upon his graduation from Iowa State University; and on 14 June 1958 he was appointed a 2nd Lieutenant in the Army Reserve.

5. (a) Plaintiff entered on extended active duty on 4 October 1958 as a 2nd Lieutenant in the Army Reserve. He served on active duty thereafter continuously until 1 November 1973.

(b) Plaintiff was appointed a 2nd Lieutenant, Regular Army, on 27 April 1959, with date of rank of 21 July 1958.

(c) Plaintiff was promoted to the temporary and permanent grade of 1st Lieutenant on 1 February 1960 and 21 July 1961, respectively.

(d) Plaintiff was promoted to the temporary and permanent grade of Captain on 30 November 1962 and 21 July 1965, respectively.

(e) Plaintiff was promoted to the temporary grade of Major on 3 February 1967.

6. Plaintiff's extended active duty was terminated on 1 November 1973 under circumstances that will be outlined in subsequent findings. At the time of his release, he had completed 17 years, 0 months, and 27 days of active military service.

7. (a) Plaintiff's basic branch is Infantry.

(b) Among others, plaintiff has been awarded the following Military Occupational Specialties ("MOS"): Field Artillery Unit Commander (1193), awarded 6 October 1958; Infantry Unit Commander (1542), awarded 29 March 1960; Training Center Unit Officer (2622), awarded 9 May 1960; Special Forces Officer (31542), awarded 8 May 1964; Adjutant (2110), awarded 26 July 1964; Nuclear Weapons Training Officer (51542), awarded 19 November 1965; Operations and Training Staff Officer (2162), awarded 22 September 1969; Service Test Officer (2040), awarded 10 August 1970; Ranger Parachutist (S1542), awarded 14 March 1972; and Personnel Staff Officer (2260), awarded 12 September 1972.

8. (a) Plaintiff completed the following course work while serving on extended active duty: Field Artillery

Officers Basic Course (17 weeks), completed 1959; Infantry Officers Basic Course (10 weeks), completed 1959; Ranger Course (9 weeks), completed 1961; Motor Transport Officers Course (9 weeks), completed 1961; Airborne Course (4 weeks), completed 1961; Counterinsurgency Officers Course (6 weeks), completed 1961; and Infantry Officers Career Course (36 weeks), completed 1966.

(b) Plaintiff has also completed Phase III of the Command and General Staff College course.

9. Plaintiff was awarded the Ranger Tab (31 March 1961) and Parachutist Badge (20 September 1961).

10. Among others, plaintiff has been awarded the Combat Infantryman Badge (1964); Bronze Star Medal (1964), with two Oak Leaf Clusters (1968 and 1969); Army Commendation Medal (1968), with Oak Leaf Cluster (1973); Air Medal (1969); and Meritorious Service Medal (1973, for service during the period from 30 April 1969 to 6 August 1973).

11. Plaintiff was sent to Vietnam in the latter part of 1961 for an initial tour of duty in that country. This tour of duty began on 2 December 1961 and continued until 26 November 1962.

12. Upon completing the 1961-62 tour of duty in Vietnam, plaintiff volunteered for service in the Special Forces of the Army, an elite element whose primary assignment is to train for and, if necessary, to participate in counterinsurgency operations in hostile territory. Plaintiff's application was accepted, and he was assigned to the 1st Special Forces Group in Okinawa. His tour of duty in Okinawa extended from 26 November 1962 to 22 June 1965.

13. (a) During the period while Okinawa was plaintiff's regular duty station, he was sent back to Vietnam on a 6-month temporary tour of duty as the leader of a

Special Forces team. The members of the team parachuted into the Vietnamese jungle; and thereafter they engaged in combat operations during the 6-month tour of duty, which covered the last 3 months of 1963 and the first 3 months of 1964.

(b) Plaintiff was awarded the Bronze Star Medal for "distinguishing himself by outstanding meritorious service in connection with ground operations against a hostile force in the Republic of Vietnam during" the period mentioned in paragraph (a) of this finding. The citation for the award further stated:

> Through his untiring efforts and professional ability, he consistently obtained outstanding results. He was quick to grasp the implications of new problems with which he was faced as a result of the ever changing situations inherent in a counterinsurgency operation and to find ways and means to solve those problems. The energetic application of his extensive knowledge has materially contributed to the efforts of the United States Mission to the Republic of Vietnam to assist that country in ridding itself of the communist threat to its freedom. His initiative, zeal, sound judgment and devotion to duty have been in the highest tradition of the United States Army and reflect great credit on him and on the military service.

14. While in Okinawa, plaintiff married his wife, an American citizen who was working in Okinawa at the time as a school teacher. The marriage occurred on 1 June 1963. It was the first marriage for both.

15. (a) Upon concluding the 1962-65 tour of duty in Okinawa, plaintiff was assigned to Ft. Benning, Georgia, where he took and completed the advanced Infantry Officers Career Course over a period of 36 weeks.

(b) A son, the first child of the plaintiff and his wife, was born at Ft. Benning, Georgia, on April 29, 1966.

16. (a) After graduating from the Infantry Officers Career Course at Ft. Benning in 1966, plaintiff was assigned to the Arctic Test Center of the Army at Ft. Greely, Alaska ("the Test Center").

(b) Plaintiff and his family arrived at Ft. Greely in June 1966.

(c) Plaintiff's assignment to the Test Center began on 22 June 1966 and continued to 21 February 1968.

(d) The plaintiff was accompanied to Alaska by his wife and infant son.

17. (a) Upon reporting to the Test Center, plaintiff was assigned to duty as a Test Officer in the Infantry, Airborne, and Individual Equipment Test Division ("the Division") at the Test Center.

(b) The Division was subdivided (at least *de facto*) into four branches: *i.e., the* Small Arms Branch, which was concerned with direct-fire weapons used by the Infantry; the Mortar Branch, which was concerned with indirect-fire weapons used by the Infantry; the Individual Equipment Branch, which was concerned with items of equipment to be worn by an individual soldier; and the Airborne Branch, which was concerned with special items of equipment to be utilized by Airborne personnel.

(c) Throughout the period while plaintiff was assigned to the Division, Lt. Colonel Alfred E. Williams ("LTC Williams") was Chief of the Division.

(d) Throughout the period while plaintiff was assigned to the Division, he was Chief of the Mortar (or indirect fire) Branch. During the latter part of plaintiff's assignment to the Division, he was also Chief of the Airborne Branch, and thus for a time supervised two branches of the Division.

(e) Another branch chief in the Division was Major Herbert Lee Gregg ("Major Gregg"), who was Chief of

the Small Arms Branch. Effective 17 November 1967, Major Gregg was also designated as Senior Test Officer in the Division, because he was, by virtue of his date of rank as Major, the senior officer in the Division (except for LTC Williams, Chief of the Division).

18. (a) As the mission of the Division was to test and evaluate various items of equipment under arctic conditions, the customary procedure was to conduct the tests at field stations within the Ft. Greely area during the winter months, when the most severe weather conditions (50° below zero, or lower) prevailed in Alaska, and then to begin the preparation of test reports in late April or May, after the weather began to moderate.

(b) The customary procedure within the Division for the preparation of a test report was for the branch chief who had conducted or supervised the testing to type a rough draft of the proposed report. The draft would be considered by a review board (sometimes referred to as the "murder board"), consisting of all the officers in the Division, including the drafter of the report but excluding the Division Chief. The members of the review board, meeting together, would consider, make comments on, and suggest changes in the report with respect to matters of content, grammar, etc. After the review board finished with the report, it was customarily presented to the Division Chief for approval or disapproval. If approved by the Division Chief, the report would be sent to the Test Center's typing pool, which would type the report on mats for reproduction. After the mats were checked within the Division for typographical errors, the report would be signed by the Commanding Officer of the Test Center, and it would then be forwarded to the Army's Test and Evaluation Command at Aberdeen Proving Ground, Maryland, for reproduction and distribution.

19. (a) Plaintiff and his family made a trip from Alaska to Japan in the summer of 1967. They returned to Ft. Greely in August 1967.

(b) When plaintiff returned to Ft. Greely in August of 1967 from the trip to Japan, he found awaiting him an official notice from the Department of the Army alerting him to the fact that he was being ordered to Vietnam for further duty, and that he was to report there not later than 28 December 1967. As plaintiff had already served in Vietnam on two occasions, once for a 1-year tour of duty and again for a 6-month tour of duty, and as he knew other Regular Army officers with less service in Vietnam, plaintiff believed that the message concerning a prospective third tour of duty in Vietnam for him had been issued by the Department of the Army through an administrative mistake. He went to the Personnel Office at Ft. Greely to discuss the matter, and was informed that an inquiry would be made to the Department of the Army about the possibility of a mistake. A day or two later, plaintiff was informed by the Personnel Office that the alert notice was valid, and that he was supposed to go to Vietnam in December 1967.

20. (a) At the time when plaintiff was notified in August 1967 that he would be sent to Vietnam for another tour of duty beginning in December 1967, plaintiff's wife was pregnant with their second child. This was a planned pregnancy, as plaintiff and his wife anticipated that, in accordance with Army policy, plaintiff's assignment to Ft. Greely would continue for at least 2 years and that the family would be together at the time of the birth and during the early infancy of the second child. It was expected that the second child would be born in December 1967.

(b) The first child of plaintiff and his wife was approximately 15 months old at the time when plaintiff and his wife learned in August 1967 that plaintiff would be sent back to Vietnam in December 1967.

21. (a) Plaintiff's wife was upset and angry over what she regarded as the unfair and unjust treatment

of her husband in being ordered back to Vietnam for a third time, when other officers of her acquaintance had less service in Vietnam. This feeling was intensified because of the family situation, *i.e.*, her first child was only about 16 months old and she was pregnant with the second child, whose birth was expected in December 1967, the month when her husband was supposed to go back to Vietnam.

(b) Plaintiffs' wife conveyed her feelings to plaintiff.

22. Under the date of 14 August 1967, plaintiff tendered to the Department of the Army, through channels, his unqualified resignation as an Army officer, "to be effective by June 1968 or earlier." The letter of resignation stated in part as follows:

> 2. I desire to tender my resignation because of extreme compassionate circumstances and personal family problems.
>
> * * * *
>
> 6. I do desire appointment in the United States Army Reserve. Application attached.

23. (a) After plaintiff submitted his formal resignation to the Department of the Army through channels, he telephoned the Infantry Officers Assisgnment Branch at Army headquarters in Washington, D.C., and orally informed the Assignment Branch regarding the submission of his resignation.

(b) Plaintiff was advised orally by the Assignment Branch that his resignation would not be accepted.

(c) Plaintiff then orally requested that the date for his reporting in Vietnam be postponed in view of the expected birth of a child to his wife in December 1967. Plaintiff was orally advised by the Assignment Branch that a postponement of his reporting date would be granted.

(d) The telephone call referred to in this finding was the only telephone call that plaintiff made to the Department of the Army with respect to his prospective assignment to Vietnam.

24. Plaintiff did not make any telephone call to any Member of Congress with respect to his prospective assignment to Vietnam.

25. On 21 September 1967, plaintiff's wife wrote a letter to Senator Everett McKinley Dirksen in Washington, D.C. The letter stated in part as follows:

> * * * Too many [other officers] have never been [to Vietnam] to merit my husband risking his life once again for a situation that truly cannot be considered in defense of America itself. We are both proud to do our part, both as a soldier in combat and as a wife waiting at home, trying to be both mother and father, trying to make his assignment go by more quickly, and trying to keep his personality and warmth alive for this [sic] babies, but enough is enough. We feel we have met our commitment in this current crisis more than amply. I feel it is time that all families in the military circuit should do their part, but that this particular hardship should be passed around and shared. If, indeed, this isn't enough, perhaps it is time part of our standing reserve force help out the professional forces . . . . . while I still have my husband. I feel, too, it is time for some of the other ladies to do their share as I have done, with their husbands to put in eighteen months as mine has done, before there is another involuntary assignment to Viet Nam from our family. It is this very situation of inequity of combat assignments among career army officers and the callous manner and lack of consideration for our personal family problems shown to us by the in-

fantry assignment branch which prompted my husband to put in his resignation.

* * * *

I am writing to you personally as we have exhausted all other possibilities for help. I am sick with fear that my having written to you will result in my husband still having to go to Viet Nam, but having his assignment altered so he will be in constant danger. Please help us, Sir.

26. The letter referred to in finding 25 was replied to by Senator Dirksen on 28 September 1967, as follows:

Although I can understand the concern expressed in your good letter of the 21st, because of your husband's status as a commissioned officer and his length of service I would be most reluctant to initiate any official inquiry on his behalf without a specific request from him.

However, if he feels there is some manner in which I can be helpful with regard to the situation you described, I would be happy to have him so advise me.

27. Following the receipt of the letter from Senator Dirksen, plaintiff wrote the following letter to Senator Dirksen on 2 October 1967:

I have read the letter you sent my wife on 28 September 1967. We have the feeling you are trying to warn us about something without stating so. There are two specific questions I have about your letter: Are you saying that if an official inquiry were made, it would have an adverse effect on my present situation while on active duty and that in reality it wouldn't do anything constructive in getting my resignation accepted? Am I doing something illegal which could result in a dishonorable

discharge or a court martial by seeking Senatorial help?

If the answers to my questions are "no", then I request that you make an official inquiry about my resignation. The point in question is why the army won't accept my resignation when I have met all of the requirements of the army regulation for resignation. I feel it unjust to keep me on active duty when neither a national emergency nor a declaration of war has been made. It is in the best interests of my family that I leave the service at this time; however, the army seems unconcerned with my reasons for resignation, insisting that I be separated from my family.

Please advise me.

28. Except for the letter referred to in finding 27, plaintiff did not write any letter to any Member of Congress with respect to his prospective assignment to Vietnam.

29. (a) Plaintiff's resignation as an Army officer was rejected by the Department of the Army in a communication dated 28 September 1967 from the Adjutant General to plaintiff. This communication stated in part as follows:

1. Current military requirements mke [sic] it necessary that the Department of the Army exercise a selective retention program for officer personnel.

* * *

2. Your resignation was considered in light of that policy and it was determined that overriding military needs in your grade and branch required your retention on active duty. You have therefore been retained until June 1969. You may, if in the future you still desire to be separated, resubmit your resignation through channels in accordance with AR

635-120 to be effected on or after the mentioned date. * * *

(b) The communication from the Adjutant General was transmitted to plaintiff through channels, and was received by him on or about 17 October 1967.

30. On 18 October 1967, supplemental orders were issued which changed the date on which plaintiff was to report in Vietnam from 28 December 1967 to 25 March 1968. These orders further provided that plaintiff and his dependents were to depart from Ft. Greely, Alaska, on 20 February 1968 for Chicago, Illinois; and that plaintiff, after a month's period of leave, was to report on 23 March 1968 to a designated Army base on the West Coast for transportation to Vietnam.

31. On 14 November 1967, plaintiff submitted to the Adjutant General of the Army, through channels, a request that his unqualified resignation as an Army officer be withdrawn.

32. The second child of plaintiff and his wife was born in Alaska on 18 November 1967.

33. When plaintiff learned definitely that his resignation from the Army was not accepted, and that it would be necessary for him to go to Vietnam for another tour of duty in any event, he undertook to accelerate the completion of the assignments on which he was working at Ft. Greely, so that they could be completed before 20 February 1968, the date on which he and his family were to leave Alaska.

34. (a) Plaintiff's principal assignments at Ft. Greely, as of the time when he learned that he would be leaving that installation on 20 February 1968, related to the testing under arctic conditions, evaluating, and reporting on a "starlight scope," which was a night-vision system to enhance the ability of Infantry personnel to see

in the nighttime, and a survival kit for use by Infantry personnel. Under normal operating conditions (see finding 18), the testing of these items would have been accomplished during the winter months of 1967-68, and the preparation of the reports would have been undertaken in about April 1968. Due to plaintiff's prospective departure from Ft. Greely on 20 February 1968, plaintiff, after completing the testing of the starlight scope and survival kit in the field, promptly began the preparation of his reports and, by accelerating the work, was able to complete the reports in draft form well in advance of his 20 February 1968 departure date and in sufficient time for the Division review board (or "murder board") to review the reports, in accordance with the customary procedure, prior to plaintiff's departure.

(b) The Division review board, which was under the chairmanship of Major Gregg and which included plaintiff but did not include the Division Chief, devoted a period of days to the draft reports which plaintiff had prepared on the starlight scope and on the survival kit. The review board found plaintiff's draft report on the starlight scope to be satisfactory, both as to format and as to content. With respect to the draft report prepared by plaintiff on the survival kit, the review board found it to be satisfactory as to format, but concluded that it did not include certain data which plaintiff had developed during the testing process and which other members of the review board regarded as pertinent to the evaluation process. Such data were included in the report by the review board.

(c) On one or two occasions while the review board was considering plaintiff's draft reports on the starlight scope and the survival kit, plaintiff suggested that members of the board should quit work at 5:00 o'clock and go home. When such suggestion was made, Major Gregg, as chairman of the review board, responded that it was

necessary to complete the preparation of the reports in final form before plaintiff left Ft. Greely and, consequently, board members should resume work on the reports in the evening, after supper. Board members, including plaintiff, returned to the Division building after supper and resumed work on the reports.

(d) By virtue of plaintiff's action in accelerating the preparation of draft reports on the starlight scope and the survival kit, and the intensive work on the reports done by the Division review board, including plaintiff, the reports were completed in final form and typed on mats prior to the time when plaintiff left Ft. Greely on 20 February 1968, so that the reports could be reproduced and distributed.

35. (a) The work done by plaintiff and another officer in connection with the testing of the starlight scope was commended by the Army Electronics Command in a communication from that command dated 5 February 1968. The communication stated in part as follows:

> 2. As test officers during the testing of the AN/PVS-2 and AN/TVS-4 by the Infantry Branch these men were faced with many unexpected difficulties due to major design deficiencies. The natural tendency would have been to stop all testing, but these men exercising personal initiative and at great personal sacrifice gave freely of their own time in coordinating with the representative of this office to resolve these deficiencies. The outstanding manner in which Major Grieg and Captain Bartholomew cooperated with the technical representative of this office was significant in the resolution of problem areas in the equipments and permitted corrective actions that prevented extensive delay in overcoming technical difficulties.
>
> 3. Without the extra effort and disregard for personal comfort and convenience shown by Major

Grieg and Captain Bartholomew, this work could not have been accomplished. The very eminently satisfactory manner in which this mission was accomplished reflects most highly on Major Grieg's and Captain Bartholomew's capabilities and their devotion to our nation's defense.

(b) The communication referred to in pargraph (a) of this finding was forwarded to plaintiff by the Commanding Officer of the Test Center, with a covering communication which stated in part as follows:

1. It is with pride and pleasure that I forward the attached correspondence from Robert E. Thonen, * * * concerning the outstanding manner in which you conducted the testing of the AN/PVS-2 and the AN/TVS-4.

2. It is apparent from the attached correspondence that your contribution to these tests does indeed merit recognition. You can be justifiably proud to have completed the tests with the many unexpected difficulties due to major design deficiencies. Your resourcefulness and tenacity in the collection of additional data will permit the design engineers to improve upon the items tested.

3. I add to Mr. Thonen's comments that your entire tenure as a test officer has been worthy of such recognition, all tests having been conducted under adverse conditions which you overcame to successfully complete your assignments. Please accept my congratulations for a job outstandingly well done.

36. (a) Plaintiff served in Vietnam on a third tour of duty from 25 March 1968 to 10 March 1969. During this tour of duty he was assigned to the 82nd Airborne Division.

(b) Plaintiff was awarded two Oak Leaf Clusters for his Bronze Star Medal on the basis of meritorious service

during two separate periods while serving in Vietnam from March 1968 to March 1969.

37. (a) Upon concluding his 1968-69 tour of duty in Vietnam, plaintiff was assigned to the Seventh Army in Germany. He was accompanied by his family. Plaintiff served in Germany for 3 years.

(b) Plaintiff volunteered for a continuing overseas assignment, and was transferred from Germany to the Southern European Task Force of the Army in Italy.

(c) The European assignments referred to in this finding lasted from 3 May 1969 to 2 July 1973.

38. (a) Plaintiff was considered, but not selected, for promotion to the permanent grade of Major in the Regular Army by an Army selection board that convened on 24 January 1972.

(b) Plaintiff was considered, but not selected, for promotion to the temporary grade of Lt. Colonel, AUS, by a selection board that convened on 5 September 1972.

(c) Plaintiff was considered, but not selected, for promotion to the permanent grade of Major in the Regular Army by a selection board that convened on 31 January 1973.

39. Upon being notified that he had been passed over a second time for promotion to the permanent grade of Major in the Regular Army and that he would be released from active duty because of this, plaintiff was, at his request, reassigned to Aberdeen Proving Ground, Maryland, to await his release from active duty.

40. On 1 November 1973, plaintiff's extended active duty in the Army was terminated because he had been considered, but not selected, on two occasions for promotion to the permanent grade of Major in the Regular Army.

41. (a) On plaintiff's application, he was appointed a Major in the Army Reserve on 12 October 1973, in connection with his release from extended active duty.

(b) As a Major in the Army Reserve (not on active duty), plaintiff's military assignment at the time of the filing of the petition was as Group S-4, 11th Special Forces Group, 1st Special Forces, Fort Meade, Maryland.

42. (a) The major factor in the plaintiff's being passed over for promotion (see finding 38) was the comparatively low Officer Efficiency Rating ("OER") that was rendered on the plaintiff for the last 3 months of his tour of duty as a member of the Division at the Test Center, Ft. Greely, Alaska.

(b) Three OER's were rendered on plaintiff in connection with his performance as a Test Officer in the Division at the Test Center. The first covered plaintiff's performance from 2 June 1966 to 1 June 1967; the second covered plaintiff's performance from 2 June 1967 to 16 November 1967; and the third (*i.e.*, the OER of critical importance in the present case) covered plaintiff's performance from 17 November 1967 to 20 February 1968.

(c) Plaintiff's composite score on the first OER mentioned in paragraph (b) of this finding was 203.7.

(d) Plaintiff's composite score on the second OER mentioned in paragraph (b) of this finding was 209.1.

(e) Plaintiff's composite score on the third OER mentioned in paragraph (b) of this finding was 166.0, which represented a decline of 43.1 points when compared with the OER for 2 June - 16 November, 1967, and a decline of 37.1 points when compared with the OER for 2 June 1966 - 1 June 1967.

43. (a) In the OER covering plaintiff's performance from 17 November 1967 to 20 February 1968, the rater, Major Gregg, made the following comments:

> MAJ John Miline [sic] Grieg, 085417, has performed his assigned duties in a superior manner during the rating period.

MAJ Grieg displayed superior technical competence in conducting arctic winter environmental tests on the Individual Aid and Survival Kit and the Weapon-sight, Night Vision. Each test was conducted in a manner that assured comprehensive use of the test items under arctic winter conditions. The thoroughness of these tests is reflected by the test data that was recorded.

After the tests were completed, MAJ Grieg failed to prepare the reports of tests in the proper format or within the required time frame. When questioned about the progress that he was making on the reports, he displayed a very negative attitude.

This officer is exceptionally well versed in numerous military respects and is proficient in the areas that he enjoys or agrees with.

(b) The indorser, LTC Williams, on the OER for 17 November 1967 to 20 February 1968 made the following comments:

MAJ Grieg was superior officer until he received his orders to Vietnam. The last 30 days that he was assigned to this Test Division his dependability was seriously affected. He conducted two arctic service tests during the test season and gathered adequate test data. One of the test reports he wrote had to be completely rewritten by other officers of this Test Division; the other test report had to have major modifications and corrections made on it. MAJ Grieg is capable of producing superior test reports as indicated by the reports he submitted for the previous test season. During MAJ Grieg's last 30 to 45 days that he was assigned to this test division he displayed a very negative attitude toward the Army.

(c) The statement by the rater that plaintiff failed to prepare the reports of tests in the proper format was not correct.

(d) The statement by the rater that plaintiff failed to prepare the reports of tests within the required time frame was not correct.

(e) The statement by the rater that plaintiff, when questioned about the progress that he was making on the reports, displayed a very negative attitude was not correct.

(f) The statement by the indorser that plaintiff's dependability was seriously affected during the last 30 days of his assignment to the Division was not correct.

(g) The statement by the indorser that one of the test reports prepared by plaintiff had to be completely rewritten by other officers of the Division was not correct.

(h) The statement by the indorser that the other test report had to have major modifications and corrections made on it was misleading, although the review board decided that additional data which plaintiff had developed should be included in one report.

(i) The statement by the indorser that plaintiff displayed a very negative attitude toward the Army during the last 30 to 45 days of his assignment to the Division was not correct.

(j) The OER for the period from 17 November 1967 to 20 February 1968 was prepared after plaintiff's departure from Ft. Greely, and plaintiff did not see it until 1972. After plaintiff learned that he had been passed over for promotion to permanent Major in 1972, plaintiff visited Army Headquarters in Washington, D.C., examined his personnel file, and noted the relatively poor OER for the period from 17 November 1967 to 20 February 1968.

(k) Neither Maj. Gregg nor LTC Williams ever discussed with plaintiff while he was at Ft. Greely any supposed deficiencies in his performance.

44. The OER for the period from 17 November 1967 to 20 February 1968 did not represent an accurate, objective, fair, or just evaluation of plaintiff's performance during such period.

45. (a) The composite score of 166.0 on plaintiff's OER for the period from 17 November 1967 to 20 February 1968 was, by a substantial margin, the lowest composite score on any OER for plaintff during his entire military service.

(b) Excluding the OER for the period from 17 November 1967 to 20 February 1968, the composite scores of the OER's that were rendered on plaintiff during his active military service averaged 202.2.

46. (a) On 5 October 1973, plaintiff filed with the Army Board for Correction of Military Records ("the ABCMR") an application for the correction of his military records under the provisions of 10 U.S.C. § 1552 and Army Regulations ("AR") 15-185.

(b) In the application, plaintiff requested: the voiding of his failure of selection for promotion to the permanent grade of Major by the 24 January 1972 and 31 January 1973 selection boards; the correction of his records to show that plaintiff was selected for promotion to the permanent grade of Major by the 24 January 1972 selection board and thereafter promoted to the permanent grade of Major, with a designation of an appropriate date of rank; the voiding of plaintiff's failure of selection for promotion to the temporary grade of Lieutenant Colonel by the 5 September 1972 selection board; the correction of plaintiff's records to show that plaintiff was selected for promotion to the temporary grade of Lieutenant Colonel by the 5 September 1972 selection board and thereafter promoted to the temporary grade of Lieutenant Colonel, with a designation of an appropriate date of rank; and such other and further relief as might be deemed necessary or appropriate in order to accord plaintiff full and complete relief.

47. (a) On 7 February 1974, plaintiff filed an appeal under the provisions of AR 623-105, in which he requested that the OER for the period from 17 November 1967 to 20 February 1968 be voided and expunged from his records.

(b) On 15 February 1974, plaintiff's AR 623-105 appeal was transmitted from the Evaluation Report Branch of the United States Army Military Personnel Center, thru the Infantry Career Branch, to the Special Review Board in the Office of the Deputy Chief of Staff for Personnel.

(c) In a comment dated 19 February 1974, the Chief of the Infantry Branch advised the Special Review Board that the Infantry Branch did not support plaintiff's appeal.

(d) In an unsigned "Case Summary," dated 25 February 1974, that was reviewed, considered, and utilized by the Special Review Board, it was recommended that plaintiff's AR 623-105 appeal be denied.

(e) On 25 February 1974, the President of the Special Review Board advised the Evaluation Report Branch of the Special Review Board's denial of plaintiff's AR 623-105 appeal relating to the OER for the period from 17 November 1967 to 20 February 1968.

(f) By means of a letter dated 27 February 1974, Plaintiff was advised of the denial of his AR 623-105 appeal relating to the OER for the period from 17 November 1967 to 20 February 1968.

48. (a) Among other things, the case summary mentioned in pargraph (d) of finding 47 referred to a contact that had been made with LTC Williams and, in part, summarized the information which he had furnished to the Special Review Board as follows:

b. MAJ Grieg was truly outstanding until he received word that he was to be reassigned to Viet-Nam, then he practically quit work. He spent most of time and energy attempting to get out of the Nam assignment. He spent considerable working time in telephoning DA and congressmen, and writing letters. "He flat went to pieces." Appellant told LTC Williams that he (MAJ Grieg) had a way out in that his wife would divorce him and refused to take their child; therefore, the Army would not send him to Viet-Nam. His attitude was negative.

c. With respect to appellant's test reports, they were late in submission and in such condition that they had to be worked over. In fact LTC Williams had to redo some of the testing because the data was not complete. The format wasn't the problem, it was the substantive deficiencies that appellant was faulted for, LTC Williams did not ask MAJ Greig to redo any of the work because it would not have done any good. The rework was done by several officers including the rater and indorser.

(b) The statement in the case summary that plaintiff practically quit work upon learning of the reassignment to Vietnam was not correct.

(c) The statement in the case summary that plaintiff spent considerable working time in telephoning the Department of the Army and Congressmen, and in writing letters, was not correct.

(d) The statement in the case summary that plaintiff "flat went to pieces" was not correct.

(e) The implication in the case summary that plaintiff was serious in mentioning the possibility of a divorce as a means of avoiding the reassignment to Vietnam was misleading.

(f) The statement in the case summary that plaintiff's test reports were late in submission was not correct.

(g) The statement in the case summary that plaintiff's reports were in such condition that they had to be worked over was misleading, in that it was customary in the Division for reports to be submitted in draft form and to be worked over by the Division review board.

(h) The statement in the case summary that LTC Williams had to redo some of the testing was not correct.

(i) The statement in the case summary that plaintiff's reports had substantive deficiencies was misleading, inasmuch as the deficiency noted by the review board was plaintiff's failure to include in one report certain of the test data which plaintiff had developed and which other members of the review board regarded as relevant for inclusion in the report.

(j) The statement in the case summary that LTC Williams did not ask plaintiff to redo any of the work because it would not have done any good was not correct, inasmuch as plaintiff, in accordance with the customary procedure in the Division, participated fully in the review of the reports and in putting them in final form for being typed on mats, reproduced, and distributed.

(k) The statement in the case summary that the indorser (LTC Williams) participated in the reworking of the reports was not correct.

49. (a) On 19 August 1977, plaintiff filed a brief in support of his application for the correction of his military records. In the brief, plaintiff amended his original application to include a request for the voiding of the OER for the period from 17 November 1967 to 20 February 1968 and the correction of plaintiff's records to show his retroactive restoration to extended active duty effective 1 November 1973.

(b) Plaintiff's application was considered on 19 October 1977 by the ABCMR in executive session. The application was denied without granting plaintiff a hearing on his application.

(c) By means of a letter dated 23 November 1977, the Deputy Director of Personnel Management Systems advised plaintiff that his application for the correction of his military records had been denied.

(d) In its discussion, the ABCMR stated in part as follows:

> *DISCUSSION:* From a review of the applicant's entire OER file it does appear that the OER in question [*i.e.*, for the period from 17 November 1967 to 20 February 1968] may have been the determining factor for his non-selection to the grades of Major-RA and LTC-AUS.

50. The present action was instituted on 26 May 1978.

51. The following statistical data relate to the actions of the 24 January 1972 and 31 January 1973 permanent Major selection boards that considered, but did not select, plaintiff for promotion to the permanent grade of Major:

	1972	*1973*
Number Considered*	1917	1922
Number Selected	1652	1480
% Selected	86.2	77.0
"Fresh Zone" Considered**	1721	1774
"Fresh Zone" Selected	1560	1457
% "Fresh Zone" Selected	90.6	82.1
Number Previously Considered		148
Number Previously Considered That Were Selected		23
% Previously Considered That Were Selected		15.5

* These were officers on the Army Promotion List, and did not include officer specialists, such as medical officers, chaplains, etc.

** Officers considered for the first time.

52. (a) Both officers serving in the Regular Army and Reserve officers serving on extended active duty were considered for promotion to the temporary grade of Lt. Colonel, AUS, by the selection board that convened on 5 September 1972. This selection board considered, but did not select, plaintiff for promotion to the temporary grade of LTC.

(b) The following statistical data relate to the action of the 5 September 1972 temporary Lt. Colonel selection board that considered, but did not select, plaintiff for promotion to the temporary grade of Lt. Colonel, AUS:

Number Considered*	1953
Number Selected	736
% Selected	69.9
"Fresh Zone" Considered	850
"Fresh Zone" Selected	687
"Fresh Zone" Retained In Grade	79
"Fresh Zone" Passed Over	84
% "Fresh Zone" Selected	80.8

* These were Regular Army officers on the Army Promotion List.

CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are adopted by the court, the court concludes as a matter of law that the plaintiff is entitled to recover, as indicated in the opinion, and judgment is entered to that effect. The amount of the recovery will be determined in subsequent proceedings under Rule 131(c).

As an incident of and collateral to the judgment in this case, the Secretary of the Army is ordered: (1) to remove from the plaintiff's records the officer efficiency rating that was rendered on the plaintiff for the period from 17 November 1967 to 20 February 1968 and the two pass-overs for promotion to the permanent grade of major, together with any other documentation or refer-

ences relating to such officer efficiency rating and pass-overs; (2) to correct the plaintiff's records to show that the plaintiff was retroactively restored to extended active duty in the temporary grade of major effective 1 November 1973, that he thereafter served on extended active duty from 1 November 1973 to 4 October 1976, and that he was retired in the grade of major on 5 October 1976; and (3) to include in the plaintiff's records an appropriate and nonprejudicial explanation with respect to the gaps created by the removal of the officer efficiency rating and the pass-overs previously mentioned.

APPENDIX C

[Army Board for Correction of Military Records]

ABCMR DECISION

NAME: GRIEG, JOHN M., 334-26-9139

APPLICANT REQUESTS: As amended by counsel:

(1) Voiding of the Officer Efficiency Report (OER) rendered on him for the period of service from 17 Nov 67 to 20 Feb 68; (2) Voiding of his failure of selection for promotion to the permanent grade of Major by the selection boards that convened on 24 Jan 72 and 31 Jan 73; (3) Correction of his records to show that he was selected for promotion to the permanent grade of Major by the selection board that convened on 24 Jan 72 and was thereafter promoted to the permanent grade of Major with designation of an appropriate date of rank; (4) Voiding of his failure of selection for promotion to the temporary grade of Lieutenant Colonel (LTC) by the selection board that convened on 5 Sep 72; (5) Correction of his records to show that he was selected for promotion to the temporary grade of LTC by the selection board that convened on 5 Sep 72 and was thereafter promoted to the temporary grade of LTC with designation of an appropriate date of rank; (6) Correction of applicant's records to show his retroactive restoration to extended active duty effective 1 Nov 73; and, (7) Such other and further relief as may be deemed necessary and/or appropriate in order to accord him full and complete relief.

APPLICANT STATES: Applicant has engaged counsel who submits a 50 page typewritten brief with 33 exhibits in his behalf. The brief indicates essentially that the OER in question was the cause for his non-selection for promotion to the permanent grade of Major and temporary grade of LTC; that the OER contains factual and material errors; does not reflect an accurate ap-

praisal of his manner of performance during the period and should be removed from his records. A complete copy of the brief is contained in the member's OMPF.

MATERIAL EVIDENCE OF RECORD: Incorporated in this memo and included by this ref are the mil and med recs which show, in pertinent part:

> *DOB:* 21 Jul 31; applicant enlisted in the USAR for a period of 8 years on 25 Nov 52. He entered on active duty on 26 Feb 54 and was REFRAD as a SP3 on 24 Feb 56. On 14 Jun 58 he accepted appointment as 2LT-USAR and entered on active duty in that grade on 4 Oct 58. He accepted appointment as 2LT-RA on 27 Apr 59. Through promotions he attained the grade of CPT-RA on 21 Jul 65 and temporary grade of Major on 3 Feb 67.

Applicant completed a tour of duty in Vietnam (Dec 61-Nov 62); Okinawa (Nov 62-Jun 65) and was serving on a tour of duty in Alaska (Aug 67) when he received notice of an impending assignment to duty in Vietnam. On 14 Aug 67 he tendered his unqualified resignation from the service stating reasons as extreme compassionate circumstances and family problems. The Department denied his request on 28 Sep 67 stating there was overriding military need for personnel in his branch and grade; that he would be retained in the Army until Jun 69; that, if he desired release at that time he could resubmit his request.

Applicant's wife then wrote Senator Everett Dirksen requesting that he intercede in her husband's behalf; that she felt it unfair since her husband had previously served in Vietnam and that at the particular time she would be left with a new infant a few weeks old and a 20 month old baby.

AS a result of this appeal the Department reconsidered the applicant's unqualified resignation but again deter-

mined on 6 Nov 67 that he would be retained until Jun 69.

Applicant departed Alaska on 20 Feb 68 for assignment to duty in Vietnam.

On 26 Feb 68 an OER was prepared on the applicant covering his duties as Test Officer, Infantry Airborne and Individual Equipment Test Division, U.S. Army Arctic Test Center, Alaska, during the period 17 Nov 67-20 Feb 68. A copy of the OER is contained in the applicant's OMPF.

Applicant completed his tour of duty in Vietnam on 10 Mar 69 and on 3 May 69 was assigned to duty in Germany.

Applicant was considered for promotion to the permanent grade of Major-RA in 1972 and 1973. In both instances he failed to be selected for promotion.

Applicant was also considered for temporary promotion to the grade of LTC in early 1973. He failed to be recommended for promotion.

Due to the applicant's failure to be selected for permanent promotion to the grade of Major in 1972 and 1973 action was taken on 31 Oct 73 to discharge him from his Regular Army Commission and the Army of the United States.

On 7 Feb 74 the applicant appealed the Department to remove the OER of 17 Nov 67-20 Feb 68 from his records. His contentions were essentially the same as to this Board. The Department denied his appeal on 27 Feb 74 stating that no violation of the letter or spirit of Army regulations was found which would warrant amendment or invalidation of the report for administrative reasons; that further, the evidence presented did not justify withdrawing or altering the report.

DISCUSSION: From a review of the applicant's entire OER file it does appear that the OER in question may have been the determining factor for his non-selection to the grades of Major-RA and LTC-AUS.

The only substantial evidence the applicant has presented for withdrawing the OER is a statement from a third party fellow-worker who states the applicant never displayed a very negative attitude towards the Army. When the case was reviewed in DCSPER action was taken in that office to contact the indorser in regards to the matter. According to DCSPER the indorser stated the applicant was truly outstanding until he received word that he was to be reassigned to duty in Vietnam; that he then practically quit work and spent most of his time and energy attempting to get out of the assignment.

Based on the evidence of records, it appears that the OER reflects a valid appraisal of the applicant's manner of performance during the period, and insufficient justifications exist for removing it from his records.

Concerning his request for promotion to the grades of Maj-RA and LTC-AUS. The removal of the contested OER would be a basis for submitting his records to a DA Standby Advisory Board to reconsider him for such promotions. Considering that the OER is not to be removed, there appears to be no basis for a correction of records to show him promoted to Maj-RA or LTC-AUS.

DETERMINATION: The appl has failed to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice to warrant a formal hearing.

/s/ [Illegible]
for RAYMOND J. WILLIAMS
Executive Secretary

APPENDIX D

[SEAL]

DEPARTMENT OF THE ARMY
U.S. ARMY MILITARY PERSONNEL CENTER
200 Stovall Street
Alexandria, Virginia 22332

Reply to Attention of:

DAPC-PAR-EA Grieg, John M.
334-26-0139 (7 Feb 74)

27 February 1974

SUBJECT: Efficiency Report

Major John M. Grieg, USAR
c/o Mr. Neil B. Kabatchnick
1225 Connecticut Avenue, N. W.
Washington, D.C. 20036

1. Further reference is made to your letter, with inclosures, concerning an efficiency report submitted on you for the period 17 November 1967 to 20 February 1968.

2. The information which you submitted and your official records, with special attention to the efficiency report in question, were reviewed impartially and comprehensively by a Department of the Army Special Review Board. It was the decision of the Board that the evidence does not justify withdrawing or altering the report in question.

3. An administrative review of the subject report was also conducted. No violation of the letter or spirit of Army Regulations was found which would warrant amendment or invalidation of the report on administrative grounds.

4. Upon presentation by you of any additional material evidence to support your claim, your appeal will be reconsidered in accordance with the time limitations outlined in AR 623-105.

5. The inclosures to your letter which are already a matter of record are being returned. Your letter and the other inclosures have been filed for informational purposes only in your Official Military Efficiency File.

BY ORDER OF THE SECRETARY OF THE ARMY:

8 Incl
as

/s/ J. Slone
J. SLONE
Major, USA
Evaluation Report Branch

APPENDIX E

IN THE UNITED STATES COURT OF CLAIMS

No. 258-78

JOHN M. GRIEG

v.

THE UNITED STATES

Before KASHIWA, *Judge*, Presiding, BENNETT and SMITH, *Judges*.

ORDER

PER CURIAM: This case comes before the court on plaintiff's motion, filed April 13, 1981, for rehearing *en banc* and other relief pursuant to Rules 7(d) and 151(b), with reference to the opinion entered herein on January 28, 1981, dismissing the petition. Upon consideration thereof, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing and other relief under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing and other relief is denied.

[Filed May 15, 1981]

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-80

JOHN M. GRIEG,

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 12, 1981

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 3rd day of August, 1981

APPENDIX G

Excerpts from Relevant Statutes

2 U.S.C. § 190g (1976):

> No private bill or resolution (including so-called omnibus claims or pension bills), and no amendment to any bill or resolution, authorizing or directing * * * (3) the correction of a military or naval record, shall be received or considered in either the Senate or the House of Representatives.
>
> (Aug. 2, 1946, ch. 753, title I, § 131, 60 Stat. 831.)

5 U.S.C. § 706 (1976):

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> * * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> * * * *
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
>
> (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

10 U.S.C.A. § 1552(a) (West Supp. 1980):

> The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of Transportation may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.
>
> (Aug. 10, 1956, ch. 1041, 70A Stat. 116; Dec. 12, 1980, Pub. L. 96-513, § 511(60), 94 Stat. 2925.)

28 U.S.C. § 1491 (1976 & Supp. III 1979):

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders direct-

ing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.

* * * *

(June 25, 1948, ch. 646, 62 Stat. 940; July 28, 1953, ch. 253, § 7, 67 Stat. 226; Sept. 3, 1954, ch. 1263, § 44(a), (b), 68 Stat. 1241; July 23, 1970, Pub. L. 91-350, § 1(b), 84 Stat. 449; Aug. 29, 1972, Pub. L. 92-415, § 1, 86 Stat. 652; Nov. 1, 1978, Pub. L. 95-563, § 14(i), 92 Stat. 2391.)

APPENDIX H

Excerpts from Department of the Army Regulations

AR 15-185 (1977) (32 C.F.R. § 581.3 (1977)):

Section II. ESTABLISHMENT, FUNCTIONS, AND JURISDICTION OF THE BOARD

* * * *

10. Consideration of application. *a.* Each application and the available military or naval records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application without a hearing. * * * *

b. The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice. The Board will not deny an application on the sole ground that the record was made by or at the direction of the President or the Secretary in connection with proceedings other than proceedings of a Board for the correction of military or naval records. Denial of an application on the grounds of insufficient relevant evidence to demonstrate the existence of probable material error or injustice is without prejudice to further consideration in the event new relevant evidence is submitted. The applicant will be informed of his privilege to submit newly discovered relevant evidence for consideration.

* * * *

d. When an original application or request for further consideration of a previously denied application is denied without a hearing, the Board's deter-

mination will be made in writing and include a brief statement of the grounds for denial.

e. The brief statement of the grounds for denial will include the reasons for the determination that relief should not be granted, including the applicant's claims of constitutional, statutory, and/or regulatory violations rejected, together with all essential facts upon which the denial is based, including, if applicable, factors required by regulation to be considered for determination of the character and reasons for a discharge. Attached to the statement will be any advisory staff opinions considered by the Board not fully set forth in the statement and any minority opinions. Counsel and applicant will be informed that the name and final vote of Board members will be furnished or made available upon request.

f. The brief statement of the grounds for denial, together with all attachments, will be furnished promptly to applicant and counsel. Classified or privileged material contained in or attached to the statement of grounds for denial may be deleted only if a written statement of the basis for the deletion is provided the applicant and counsel.

Section IV. ENTITLEMENT TO HEARING

11. General. In each case in which the Board determines that a hearing is warranted, the applicant will be entitled to appear before the Board either in person or by counsel of his/her own selection or in person with counsel.

* * * *

14. Witnesses. The applicant will be permitted to present witnesses in his/her behalf at hearings before the Board. It will be the responsibility of the applicant to notify his/her witnesses and to arrange

for their appearance at the time and place set for hearing.

* * * *

AR 623-105 (1966):

Section I. GENERAL

* * * *

2. Use of efficency reports. *a.* Officer efficiency reports serve two primary purposes—

(1) Provide a measure of an officer's overall value to the service to be used with other information as a basis for personnel actions (i.e., assignments, school selections, RA appointment, promotions, retention, and elimination).

(2) Furnish information necessary for efficient utilization and assignment of indivdiual officers.

b. Each efficiency report is intended to report manner of performance of specific duties and for specific periods. The report will not contain remarks pertaining to prior or subsequent manner of performance or incidents. A single report provides an estimate of the officer's manner of performance, personal qualities, professional qualifications and potential as demonstrated during a specific period and in a particular duty assignment.

* * * *

* * * *

3. Responsibility of commanders. Commanders are responsible for establishing controls to insure that—

* * * *

c. Each officer knows who his rating and indorsing officers are and on whom he must submit or indorse a report.

* * * *

AR 623-105 (1972):

8-1. General.

* * * *

b. An evaluation report accepted by HQDA for inclusion in the official record of an officer is considered to be administratively correct, to have been prepared by the properly designated rating officials, and to represent the considered opinions of such rating officials at the time of preparation. An officer may appeal any report which he believes to be administratively incorrect or in violation of the intent of this regulation. An officer should appeal a report he believes improper only if he can provide substantial evidence in support of his belief.

c. Substantial evidence is defined as statements from third parties who were in official positions which enabled them to observe directly the manner in which the appellant performed his duties during the rated period, and/or other pertinent documentary evidence from official sources. * * * * *

* * * *

8-3. Processing and resolution.

* * * *

b. Appeals based on claims of other than administrative error are forwarded through the officer's career branch to a Special Review Board for determination of action. If the Special Review Board determines that the claim is without foundation, the report will remain in the officer's file without alteration. If it is determined that the report should be deleted in total or part, the Board will, instruct The Adjutant General accordingly.

APPENDIX I

Excerpts from S. Res. 274, 96th Cong., 1st Sess., 125 Cong. Rec. S16588 (daily ed. Nov. 14, 1979), *as amended by* S. Res. 389, 96th Cong., 2d Sess., 126 Cong. Rec. S2942 (daily ed. March 25, 1980):

STANDING RULES OF THE SENATE

* * * *

RULE XIV

BILLS—COMMITMENT AND CONSIDERATION BARRED

* * * *

9. No private bill or resolution (including so-called omnibus claims or pension bills), and no amendment to any bill or resolution, authorizing or directing * * * * (3) the correction of a military or naval record, shall be received or considered.

* * * *

SEC. 2. (a) Sections 131, 133, 133A, 133B, 134, 135, 136, and 139 of the Legislative Reorganization Act of 1946, insofar as they relate to the Senate, are repealed. Until otherwise provided by law or resolution of the Senate, the provisions of subsections (a) through (h) of section 202 of such act shall not apply to committees of the Senate.

* * * *

Opposition

Office - Supreme Court, U.S.
FILED
DEC 17 1981
ALEXANDER L. STEVAS
CLERK

No. 81-685

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHN M. GRIEG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-685

JOHN M. GRIEG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner attacks the standard of review used by the Court of Claims in rejecting his challenge to the Army's decision not to promote him.

1. While petitioner was a major in the Army, he was twice passed over for promotion by Army selection boards, making him subject to mandatory discharge from the service. 10 U.S.C. 3303(d). Petitioner filed administrative appeals to the Army Special Review Board and the Army Board for Correction of Military Records,[1] alleging that he

---

[1]The Special Review Board is a board of military officers convened in the office of the Army's Deputy Chief of Staff for Personnel (Pet. App. 6a-7a). The Correction Board is a board of civilians established by the Secretary of the Army pursuant to 10 U.S.C. 1552 to "correct any military record * * * when * * * necessary to correct an error or remove an injustice." It had authority to grant petitioner full relief (see Pet. App. 10a).

had been denied the promotions because of an inaccurate and unfair Officer Efficiency Report (OER) that had been placed in his file. Both the Special Review Board and the Correction Board denied relief (Pet. App. 1a-2a, 6a-7a), the Correction Board finding that the contested OER "reflect[ed] a valid appraisal of [petitioner's] manner of performance" (*id.* at 6a).

Petitioner then filed suit in the United States Court of Claims seeking back pay and reinstatement to duty and asking the court to void the challenged OER and the decisions to deny him promotions. One of the court's trial judges[2] heard evidence in addition to that contained in the administrative record of the Correction Board (Pet. App. 4a-5a), concluded that the contested OER was " 'unfair and unjust' " (*id.* at 8a), and recommended that the Court of Claims enter judgment for petitioner (*id.* at 20a-32a).

The Court of Claims reviewed in detail the evidence assembled by the Army boards and the testimony given before the trial judge (Pet. App. 3a-7a, 13a-15a) but ruled that under its precedents it could not "overturn selection boards and correction boards because something that they have done * * * is simply 'unfair and unjust' " (*id.* at 8a). Instead, the court said, "well-settled rules of law" (*id.* at 12a) required petitioner to show that " 'the Corrections Board's decision was illegal because it was arbitrary, or capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law' " (*id.* at 10a, quoting *Sanders* v. *United*

---

[2]The Court of Claims is authorized by 28 U.S.C. 792 to appoint commissioners to conduct, *inter alia*, evidentiary hearings or trials such as the one conducted here, pursuant to 28 U.S.C. 2503 and the rules of the court. The court has renamed its commissioners "trial judges." Note preceding Rule 1, Rules of the Court of Claims. The court passes on all "questions and findings" contained in the report or "recommended decisions" of the commissioners. See 28 U.S.C. 2503(b); Rule 147(b), Rules of the Court of Claims.

States, 594 F. 2d 804, 811 (Ct. Cl. 1979)). While "[t]he trial judge heard the evidence, evaluated [petitioner's] perfo.-mance, and concluded that the OER for the period in dispute did not accurately reflect [petitioner's] performance[,] [a] contrary conclusion would have been equally plausible and well supported" (Pet. App. 13a). Because the Correction Board's decision was not arbitrary or capricious and was supported by substantial evidence (*id.* at 16a), the court denied relief, concluding (*id.* at 19a): "[R]easonable minds can differ on the evidence here. Where that is so, we can go no further."

2. Petitioner contends, in essence, that the Court of Claims should have reviewed the Army's decisions more searchingly. But the courts of appeals have unanimously rejected the de novo review standard urged by petitioner and have chosen instead the standard applied by the Court of Claims in this case. See, *e.g.*, *Knehans* v. *Alexander*, 566 F. 2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978); *Bensing* v. *United States*, 551 F. 2d 262 (10th Cir. 1977); *Baker* v. *Schlesinger*, 523 F. 2d 1031 (6th Cir. 1975), cert. denied, 424 U.S. 972 (1976); *Horn* v. *Schlesinger*, 514 F. 2d 549 (8th Cir. 1975); *Hodges* v. *Callaway*, 499 F. 2d 417 (5th Cir. 1974); *Peppers* v. *United States Army*, 479 F. 2d 79 (4th Cir. 1973); *Haines* v. *United States*, 453 F. 2d 233 (3d Cir. 1971); *Sanford* v. *United States*, 399 F. 2d 693 (9th Cir. 1968). It is a basic principle of administrative law that, "in the absence of specific statutory authorization, a *de novo* review is generally not to be presumed." *Consolo* v. *FMC*, 383 U.S. 607, 619 n.17 (1966). Petitioner has not cited any statute or offered any other reason why the courts should substitute their judgment for well-founded, non-arbitrary administrative decisions on the sensitive, difficult, and specialized subject of military promotions. " 'It is difficult to conceive of an area of governmental activity in which the courts have less competence.' " *Rostker* v. *Goldberg*,

No. 80-251 (June 25, 1981), slip op. 7, quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

Petitioner urges (Pet. 15-17) that because the Court of Claims, under such decisions as *Bray* v. *United States*, 515 F. 2d 1383 (1975), and *Brown* v. *United States*, 396 F. 2d 989 (1968), permits evidence not in the administrative record to be introduced in review proceedings, the court is obligated to review the administrative decision de novo. This is simply a non sequitur. As the Court of Claims remarked in *Bray* (515 F. 2d at 1391; footnote omitted):

> In the trial de novo, deference is accorded the judgment and expertise of the administrative decision-maker by limiting judicial intervention only to those instances where the administrative decision, on the basis of all the evidence, was arbitrary, capricious, unsupported by substantial evidence, or inconsistent with applicable statutes or regulations. The substantial-evidence standard applies to review of the administrative decision, and the acceptance of new evidence has not encroached upon the administrative process.

Cases such as *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974), and *United States* v. *First City National Bank*, 386 U.S. 361 (1967), on which petitioner relies, involved statutes that explicitly required de novo review. See 415 U.S. at 15; 386 U.S. at 368. As noted above, no such statute applies to petitioner's claim.

Similarly, *Camp* v. *Pitts*, 411 U.S. 138, 141-142 (1973), a case cited by petitioner, established that the Administrative Procedure Act—assuming arguendo that it is applicable here—does not require de novo review merely because the agency did not conduct an adversary hearing. See also

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402, 415-416 (1971).[3]

Finally, petitioner's assertion that the procedures used in reviewing his claim violate the Due Process Clause (Pet. 25-27) is implausible. Even assuming that petitioner's interest in continuing in military service was protected by the Due Process Clause (but see *Knehans* v. *Alexander, supra*, 566 F. 2d at 314), the procedures followed were plainly adequate. Petitioner's claim was aired in four forums, and he was allowed to introduce evidence in his own behalf and to question those responsible for his unfavorable OER. Indeed, petitioner concedes that the Court of Claims affords the hearing required by due process (Pet. 26); his objection appears to be only that by not reviewing the administrative decision de novo the court "rendered this procedural protection meaningless" (*ibid.*). But it is well established that a judicial determination that agency action is not arbitrary and capricious and is founded on substantial evidence satisfies the Due Process Clause. See, *e.g.*, *Crowell* v. *Benson*, 285 U.S. 22 (1932).[4]

---

[3]Petitioner also asserts (Pet. 24-25) that the Court of Claims' approach in this case is inconsistent with 10 U.S.C. 1552, the statute establishing the Correction Board. But Section 1552 refers only to the standards that are to be applied by the Correction Boards; it says nothing about the standard of judicial review.

[4]There is no basis for petitioner's assertions (Pet. 19-23) that the Court of Claims ignored the evidence he presented and examined only that which supported the Correction Board's decision. As the court's opinion (Pet. App. 2a-5a, 13a-15a, 17a) and petitioner's own discussion (Pet. 21) show, the court examined the evidence supporting petitioner's contention, described its weaknesses and explained why it did not demonstrate that the Board's decision was arbitrary. While the court stated the obvious truth that "it will always be difficult to overcome the discretionary judgments and evaluations by the rater * * *. [T]his is as it should be" (Pet. App. 15a), it explicitly recognized that the government's concession of error was only one means by which a decision might be overturned (*id.* at 15a, 16a-17a).

Petitioner identifies no conflict in the circuits warranting this Court's review. Petitioner asserts that some circuits are *less* willing than the Court of Claims to permit parties challenging military decisions to introduce evidence in their own behalf (Pet. 18-19); this scarcely gives petitioner reason to complain. Petitioner appears to concede, as he must, that no circuit applies a different standard of review from that used by the Court of Claims (see *id.* at 19 n.19).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1981

DOJ-1981-12

Petitioner's Reply Brief

Office-Supreme Court, U.S.
FILED
DEC 23 1981
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No. 81-685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN M. GRIEG,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Claims

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-685

JOHN M. GRIEG,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Claims

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REPLY BRIEF FOR PETITIONER

By combining oversimplification with mischaracterizations of petitioner's claim, respondent's opposition attempts to mask the significance of the decision at issue. This treatment is belied, however, by the first paragraph of the Court of Claims' opinion, which acknowledges that "[t]his case . . . presents to the court important questions concerning our jurisdiction and permissible scope of review." A. 2a. It is further belied by close examination of respondent's arguments, which we undertake below.

1. *This Case Does Not Involve Judicial Review Of Military Promotion Decisions, But Rather Judicial Review Of Civilian Correction Board Findings.* Respondent (at 1) characterizes petitioner's claim as one "attack[ing] the standard of review used by the Court of Claims in rejecting his challenge *to the Army's decision not to promote him*," and elsewhere respondent contends

(at 3) that courts should be wary of interfering with "the sensitive, difficult, and specialized subject of military *promotions*." (Emphasis added.) This case, however, does not concern judicial review of the military's promotion decisions. It deals instead with the way in which the Court of Claims reviews adverse decisions by *civilian* boards created by Congress to correct military records which are in "error" or which constitute an "injustice." 10 U.S.C. § 1552.[1] These civilian boards rule upon the validity of a wide variety of military records,[2] and, as we have shown in the petition (at 4, n.6, 17-18), their findings, like those of other Federal civilian agencies, are subject to judicial review in accordance with the Administrative Procedure Act (APA).

To be sure, the error in petitioner's military records eventually led, *inter alia*, to his failure of promotion, and ultimately to his involuntary separation from the Army after seventeen years of active duty. However, as both the trial judge and Court of Claims made clear, even were his records to be corrected by virtue of this litigation, no court could award him the promotion which he was denied. A. 8a, 32a.

2. *Petitioner Does Not Seek A Trial De Novo, But Merely Asks That The Appropriate Scope Of Review*

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[1] As we have shown in our petition (at 3), Congress created these civilian correction boards at the same time it enacted legislation (now superseded in the Senate's case by rules) which prohibits the correction of military records by private bill.

[2] See, *e.g.*, *Nolen* v. *Rumsfeld*, 535 F.2d 888 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977) (correction of military records to show service-connected hypertension and thus effectuate claim for disability); *Montilla* v. *United States*, 457 F.2d 978 (Ct. Cl. 1972) (correction of military records to show the minimum 20 years of service necessary to qualify for retired pay benefits); *Oleson* v. *United States*, 172 Ct. Cl. 9 (1965) (correction of military records sought by relative of deceased serviceman to show that, based upon serviceman's years of service, he was entitled to retired pay benefits).

Be Applied At The Trial De Novo Which Is Already Provided As Of Right. Respondent (at 4) characterizes the petition as urging that "the [Court of Claims] is obligated to review the administrative decision *de novo*," and takes us to task (at 3-4) for not specifying a statute under which such review is authorized. As we noted in our petition (at 16), this Court has recognized that § 706 of the APA authorizes *de novo* review of agency adjudications, such as the correction board proceedings at issue here, whenever "the agency factfinding procedures are inadequate." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971); *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). See also, *e.g.*, *Porter* v. *Califano*, 592 F.2d 770, 782-84 (5th Cir. 1979); *United States* v. *Holcomb*, 651 F.2d 231, 236 (4th Cir. 1981).[3] In this vein, the Court of Claims, having reviewed at length the inadequacies of correction board procedures, has held that claimants in such cases must be provided with a trial *de novo*, because the fact gathering processes of such boards "are too infirm and incomplete." *Brown* v. *United States*, 396 F.2d 989, 997 (1968). Thus, petitioner does not seek a trial *de novo* here, because plaintiffs in the Court of Claims are already "entitled to a trial on the merits, as a matter of right." *Bray* v. *United States*, 515 F.2d 1383, 1390 (Ct. Cl. 1975).

What petitioner *is* urging in this case is that the Court of Claims apply the appropriate scope of review in these *de novo* trials. As our petition points out (at

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[3] In the petition (at 17-18), we have shown that the APA has been consistently applied by the courts to civilian correction board cases. See, *e.g.*, *Neal* v. *Secretary of Navy*, 639 F.2d 1029, 1036 (3d Cir. 1981); *Roelofs* v. *Secretary of Air Force*, 628 F.2d 594, 599 (D.C. Cir. 1980); *Buchanan* v. *United States*, 621 F.2d 373, 384 (Ct. Cl. 1980). Respondent has cited no case law to the contrary. It should also be noted that the APA defines an "adjudication" as the "final disposition . . . in a matter other than rule making . . ." 5 U.S.C. § 551(6), (7).

16-17), this Court has consistently held that, once a plaintiff establishes a right to a *de novo* trial, he is entitled to "independent judicial factfinding," *Citizens to Preserve Overton Park, Inc., supra*, 401 U.S. at 415. It has further held that a Court of Claims "*de novo* proceeding" must be "unfettered by any prejudice from the agency proceeding" and "free from any claim that the [agency's] determination is supported by substantial evidence." *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 23 (1974). See also, *e.g.*, *United States* v. *First City National Bank*, 386 U.S. 361, 368 (1967) (trial judge in a *de novo* proceeding "should make an independent determination" of the facts). Yet, in correction board cases, the Court of Claims, despite its requirement of *de novo* trials, sustains board findings so long as supported by "substantial evidence."

It is the use of the substantial evidence test in conjunction with *de novo* trials which petitioner challenges, and the respondent has not cited a single precedent outside of the correction board context for upholding this practice. Respondent (at 3) instead string-cites a series of decisions of the courts of appeals which it contends "have unanimously rejected the *de novo* review standard urged by petitioner . . . ." Except for a Ninth Circuit decision (which we contend is in conflict with the instant case (see pp. 8-9, *infra*)), in none of these cases was the question of *de novo* review even raised, much less "rejected" by the courts.

3. *Contrary to Respondent's Assertion, The Decision Below Does Not Permit The Weighing Of Evidence Adduced By Plaintiffs At De Novo Trials.* Petitioner further contends (at 19-23) that the Court of Claims' articulation of the "substantial evidence" test, assuming its applicability to the present case, conflicts with this Court's requirement that in determining "[t]he substantiality of evidence [a court] must take into account whatever in the record fairly detracts from its weight."

Universal Camera Corp. v. *NLRB*, 340 U.S. 474, 488 (1951). In keeping with that ruling, the trial judge below, after considering all of the evidence adduced at the trial *de novo* (including an admission by one of the rating officials who prepared the disputed Officer Efficiency Report ("OER") that derogatory comments in the OER and other *ex parte* statements made by him were factually incorrect), concluded that the correction board decision not to void the OER was "unsupported by substantial evidence . . . and contrary to law." A. 31a. The Court of Claims reversed, holding that "the OER [itself] . . . constituted substantial evidence" sustaining the correction board decision, because "[i]t is the rater's [*ie.*, one of the preparers of the document] view that counts in the end" and there was no showing of a "gross material error of fact" or a "gross injustice," such as "a concession by the rater or indorser that the rating was factually wrong." A. 15a, 16a, 18a.

Respondent argues (at 5, n.4) that, in reaching that result, "the [Court of Claims] examined the evidence supporting the petitioner's contention . . . ." However, as we explained in our petition (at 20-21), it did not do so in order to *weigh* the particular evidence presented by this petitioner against his OER, as *Universal Camera Corp.* requires, but rather to make it unmistakably clear that this type of evidence, whenever introduced, should *not* be considered by trial judges when reviewing correction board decisions.

In any event, even had the court weighed petitioner's case against the OER in dispute, it would have done so only to determine if his presentation satisfied the court-imposed standards of a "*gross* material error of fact" or a "*gross* injustice." As noted in the petition (at 24-25), these standards, which have been developed by the court to review correction board decisions, are completely inconsistent with the correction board statute (10 U.S.C. § 1552), which requires the correction of military records

if either an "error" or "injustice" is shown. See, *e.g.*, *Sanders* v. *United States*, 594 F.2d 804, 812 (Ct. Cl. 1979) (*en banc*) (pursuant to § 1552, "the Secretaries have a duty as well as the power to afford servicemen proper relief"). Respondent does not deny that the Court of Claims has created standards which are stricter than those specified in § 1552. Instead, it merely notes (at 5, n.3) that "[§]1552 refers only to the standards that are to be applied by the Correction Boards; it says nothing about the standard of judicial review." In effect, without citing any precedent, respondent is arguing that a reviewing court can uphold administrative action under standards of its own creation that are markedly different from the standards mandated by Congress. By elevating the terms "error" and "injustice" to "gross material error of fact" and "gross injustice," the Court of Claims has rewritten § 1552 in a way which contradicts its own earlier recognition that the statute is "remedial" and to "be liberally construed," *Oleson*, *supra*, 172 Ct. Cl. at 18 (1965), and which substantially narrows the situations involving errors or injustices in which relief will be granted.

4. *The Procedures Afforded Petitioner Were Not, As Respondent Contends, "Plainly Adequate."* Petitioner maintains (at 25-27) that, under the Due Process Clause, he was entitled at a minimum, to a full *post*-termination trial to challenge the lawfulness of his forced separation from the Army. He contends that that right was abridged below, because the restrictive scope of review articulated and applied by the Court of Claims in this case has the practical effect of prohibiting the *consideration* of evidence adduced by a plaintiff before that court's trial division. Respondent answers by first assuming that petitioner is entitled to procedural due process and by then summarily stating (at 5) that "the procedures followed were plainly adequate," in that "[p]etitioner's claim was aired in four forums, and he was allowed to introduce evidence in his own behalf and to question those responsible

for his unfavorable OER." The petition outlines both in detail (at 8-13) and on a summary basis (at 15, n.17) the procedures afforded petitioner in this case. The following abbreviated sketch should suffice to rebut respondent's analysis:

> FIRST FORUM (Army Special Review Board): Petitioner's application denied in a one-page letter (A.63a-64a) without oral hearing on the basis of undisclosed and unsigned staff memorandum which, in turn, is based on an undisclosed *ex parte* telephone conversation with one of the officers responsible for preparing and endorsing the OER.
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> SECOND FORUM (Army Board for Correction of Military Records): Petitioner's application rejected in four-paragraph statement of reasons (A. 62a) which relies extensively upon the above-referenced *ex parte* telephone conversation; evidentiary hearing denied; matter resolved on the same day the correction board disposes of 110 applications and conducts three evidentiary hearings.
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> THIRD FORUM (Court of Claims Trial Division): After plenary trial, during which the officer who prepared and endorsed the OER and made the *ex parte* telephone conversation acknowledges that there are errors in both the OER and unsigned staff memorandum summarizing his *ex parte* telephone conversation (Pet. 11-12), trial judge finds that derogatory statements included within the OER are "not correct" and that correction board decision is "unsupported by substantial evidence . . . and contrary to law." A. 31a, 50a-51a.
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> FOURTH FORUM (Court of Claims): Without even acknowledging the admissions of error by the officer who endorsed the OER and who participated in the *ex parte* telephone conversation, Court of Claims panel reverses on the ground that the OER itself "constitute[s] substantial evidence," because "it is the rater's view that counts in the end," and "there

is no concession by the rater and indorser that the rating was factually wrong." A. 12a, 16a, 18a.

These procedures were far from "plainly adequate," and, as we have shown (at 26, n.25), they provided petitioner, a much decorated combat veteran, with far less protection than procedures afforded prisoners and school children in similar due process contexts.

5. *Contrary to Respondent's Assertion, The Conflict Which Exists Between The Court of Claims And Other Circuits Does Warrant This Court's Review.* In our petition (at 18-19), we identified a conflict between the Court of Claims and the circuits in reviewing correction board decisions. Respondent contends (at 6) that there is "no conflict in the circuits warranting this Court's review," because petitioner has only shown that "some circuits are *less* willing than the Court of Claims to permit parties . . . to introduce evidence in their own behalf," and "no circuit applies a different standard of review from that used by the" court below. (Emphasis in original.) As our petition shows, however, the Fifth Circuit in this context allows plaintiffs a trial *de novo, and* permits trial judges to review the *entire de novo* record to determine whether a correction board finding should be sustained. *Nolen* v. *Schlesinger*, 492 F.2d 787 (5th Cir. 1974); *Nolen* v. *Rumsfeld, supra*, 535 F.2d at 889-90. Moreover, the Ninth Circuit, which like the Third (*Ragoni* v. *United States*, 424 F.2d 261, 263 (3d Cir. 1970)) does not afford *de novo* review, approves the practice of a trial court "review[ing] *all* documentary evidence submitted" by the plaintiff. *Sanford* v. *United States*, 399 F.2d 693, 694 (9th Cir. 1968) (emphasis added). Both the Fifth and Ninth Circuits' approaches are in stark contrast to the Court of Claims' ruling here that in the absence of a "*gross* material error of fact" or a "*gross* injustice," such as a "concession . . . that the [record] was factually wrong," the disputed record itself "constitute[s] substantial evi-

dence." A. 15a, 16a, 18a (emphasis added). It was therefore simply incorrect to say that each of the conflicting circuits affords plaintiffs less protection than they receive in the Court of Claims.[4]

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[4] Both the House and Senate have recently passed legislation which would merge the seven judges of the Court of Claims and the five judges of the Court of Customs and Patent Appeals into a new United States Court of Appeals for the Federal Circuit. See H.R. 4482, 97th Cong., 1st Sess. (1981), *passed at* 127 Cong. Rec. H8442 (daily ed. Nov. 18, 1981); S. 1700, 97th Cong., 1st Sess. (1981), *passed at* 127 Cong. Rec. S14723 (daily ed. Dec. 8, 1981). The likelihood that these bills will be enacted into law is presently uncertain, because of the addition of a controversial rider to the Senate bill on the floor of the Senate. See 127 Cong. Rec. at S14697-723. Should these bills become law, the new court would inherit substantially all of the present Court of Claims' appellate jurisdiction. The only jurisdictional change which would be relevant here is that the new court would gain exclusive jurisdiction over appeals from district court judgments in cases brought pursuant to 28 U.S.C. § 1346(a)(2) (Supp. III 1979), which would include correction board cases involving claims against the government not exceeding $10,000 in amount. See H.R. 4482, *supra*, at § 125(a); S. 1700, *supra*, at § 127(a). The new court, however, would not be given appellate jurisdiction over correction board actions filed in district courts in the nature of mandamus or correction board cases in the district courts involving only prayers for declaratory or injunctive relief. 28 U.S.C. §§ 1331, 1361, 2201 (1976 & Supp. III 1979). Appeals in these cases would, as at present, only be heard in the appropriate existing circuits. See *Sanders*, *supra*, 594 F.2d at 810 n.10. Thus, the conflict among federal appellate courts identified above and the substantial confusion resulting therefrom will not be eliminated even if these bills become law.

CONCLUSION

For the reasons stated herein and in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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